TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 573

HIGHLAND FARMS DAIRY, INCORPORATED, AND LUTHER W. HIGH, APPELLANTS,

vs.

J. P. AGNEW, CHAIRMAN, KONE BRUGH, AND T. R. SNAVELY, AS MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

FILED DECEMBER 17, 1936.

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INDEX.

	Original	Print
Record from D. C. U. S., Eastern Virginia	1	1
Caption (omitted in printing)	1	
Amended bill of complaint	1	1
Exhibit "A"—Milk and Cream Act	22	18
Exhibit "B"—Minutes of public hearing	32	30
Exhibit "C"—Rules and regulations re Arlington-Alexandria market	40	37
Motion for temporary restraining order	47	44
Order filing amended bill of complaint and convening court	51	47
Stipulation of facts	53	48
Exhibit 1—Letter, Frank S. Walker to Commission, February 19, 1936	65	59
Exhibit 2—Official State Highway Map	66	60
Exhibit 3—Letter, Governor to the General Assembly, March 10, 1934	67	61
Exhibit 4—Milk production cost survey	68	62

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	Original	Print
Record from D. C. U. S., Eastern Virginia—Continued		
Affidavit of Philip Rosenfeld	70	64
Application for distributor's license	73	66
Bill of complaint and proposed decree in Law and Equity Court of City of Richmond, Commission v. High et al.	75	67
Joint and separate answer of J. S. Agnew, Chairman, and Kone Brugh and T. R. Snavely, Members of Milk Commission	80	70
Legal notices of public hearing	97	84
Amended answer	98	84
Order filing amended answer	99	85
Order denying temporary restraining order, etc.	100	85
Opinion, Soper, J.	103	87
Final decree denying injunction and dismissing bill of complaint	133	113
Notice of appeal	135	114
Petition for appeal	136	115
Assignment of errors	136	115
Prayer for reversal	137	116
Order allowing appeal	139	117
Appeal bond (omitted in printing)	140	
Application for stay pending appeal	145	117
Decree of Law and Equity Court of City of Richmond	148	119
Citation with marshal's return (omitted in printing)	150	
Order on application for stay pending appeal	152	120
Præcipe for transcript of record	153	121
Stipulation as to transcript of record	155	122
Order extending time	158	122
Certificate of clerk (omitted in printing)	159	
Statement of points to be relied upon and designation as to printing record	160	123

[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

In Equity. No. 363

HIGHLAND FARMS DAIRY, INCORPORATED, a Corporation, and LUTHER W. HIGH, Complainants,

versus

J. S. AGNEW, Chairman, and KONE BRUGH and T. R. SNAVELY, as the Members of the Milk Commission of the Commonwealth of Virginia, Defendants

AMENDED BILL OF COMPLAINT—Filed July 8, 1936

To the Honorable the Judges of the District Court of the United States for the Eastern District of Virginia, in Equity sitting:

[fol. 2] Highland Farms Dairy, Incorporated, a corporation, and Luther W. High, bring this complaint against J. S. Agnew, Chairman, and Kone Brugh and T. R. Snavely, as the members of the Milk Commission of the Commonwealth of Virginia, and respectfully show unto this Honorable Court as follows:

1. The plaintiff Highland Farms Dairy, Incorporated, a corporation, was at all times hereinafter mentioned, and still is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Virginia, and has its principal place of business in the City of Washington, in the District of Columbia; the plaintiff Luther W. High is a citizen of the United States and a resident of the District of Columbia.

2. The defendant J. S. Agnew is the duly appointed, qualified and acting Chairman of the Milk Commission of the Commonwealth of Virginia, and the defendants Kone Brugh and T. R. Snavely are duly appointed, qualified and acting members of said Commission; said defendants maintain an office for the regular conduct of their duties as such Milk Commission of the Commonwealth of Virginia in the Eastern District of Virginia, and constitute the Milk Com-

mission; each of said defendants are citizens and residents of the Commonwealth of Virginia.

3. The ground upon which the jurisdiction of this Court depends is that this suit is one of a civil nature in equity and arises under the Constitution of the United States, as will hereinafter more fully appear. The amount in controversy in this suit exceeds the sum or value of Three Thousand Dollars ($3000), exclusive of interest and costs.

4. The plaintiff Highland Farms Dairy, Incorporated, is engaged and at all times hereinafter mentioned, has been engaged in the business of operating a creamery for the pasteurizing and processing of milk at Washington in the District of Columbia and has invested in said business a [fol. 3] sum in excess of $50,000.00; the said plaintiff corporation is not a producer of milk but buys milk from certain selected farmers or producers in the District of Columbia, State of Maryland and the Commonwealth of Virginia, for delivery of said milk to its creamery at Washington as aforesaid; the said plaintiff corporation purchases approximately 575,228 pounds of milk monthly from the farmers or producers as aforesaid, and of said total amount of milk so purchased monthly, approximately 112,449 pounds, being 19½% of the total purchased, is purchased from farmers or producers who are in the Commonwealth of Virginia. A portion of the milk so purchased in the Commonwealth of Virginia as aforesaid, has been, is and will continue to be produced in the Arlington-Alexandria production area, as hereinafter referred to.

5. In the routine procedure at the creamery of the plaintiff corporation, all milk is treated as a whole unit, without regard to the source of its supply, in that all milk, irrespective of from where it came, is poured into receiving tanks and from there pumped through a cooler into holding vats, and after pasteurizing and processing, is bottled; as a result thereof, milk received from farmers and producers, in the Commonwealth of Virginia, is commingled with milk received from farmers and producers in the District of Columbia and in the State of Maryland.

6. The plaintiff corporation sells its entire output of bottled milk to the plaintiff Luther W. High, for retail sale by said plaintiff Luther W. High in the City of Washing-

ton, District of Columbia, State of Maryland, and in the Commonwealth of Virginia, as will more fully hereinafter appear; that because of the commingling of milk at said creamery, it is impossible for any person to determine what portion, if any, of the milk delivered to the plaintiff Luther W. High, for retail sale in the Commonwealth of Virginia, [fol. 4] was produced in or purchased by plaintiff corporation, in the Commonwealth of Virginia.

7. The plaintiff corporation sells said milk to the plaintiff Luther W. High, as aforesaid, in units and at wholesale prices, as follows:

Milk, 4% butterfat	8¢ per quart.
Cultured wholemilk	6¢ per quart.
Chocolate milk	4¢ per pint.
Cream 20% butterfat	20¢ per pint.
	11¢ per half pint.
Cream 40% butterfat	30¢ per pint.
	15¢ per half pint.

8. The plaintiff Highland Farms Dairy, Incorporated has obtained all licenses and permits required by the sanitary laws and regulations effective in the City of Washington, District of Columbia, the State of Maryland and the Commonwealth of Virginia, for the lawful conduct of its said business and it has duly kept, observed and performed all of the provisions of each of said sanitary laws and regulations of the Commonwealth of Virginia, for the lawful conduct of its said business.

9. The plaintiff Luther W. High is engaged and at all times hereinafter mentioned has been engaged in the business of operating retail stores for the sale of ice cream, milk and certain other dairy products in and about the City of Washington, in the District of Columbia, the State of Maryland and the Commonwealth of Virginia, and in the course and conduct thereof engages in the business of handling and selling bottled milk in and about the Arlington-Alexandria sales area, as hereinafter referred to, in the Commonwealth of Virginia, and has invested in said business in Virginia a sum in excess of $30,000.00. The plaintiff has built up a large and extensive business in the retail sale of milk in bottles to consumers. The said plaintiff Luther W. High purchases in the District of Columbia, under con-

tracts, all of the output of bottled milk of the said plaintiff [fol. 5] Highland Farms Dairy, Incorporated. The said plaintiff Luther W. High does not purchase from producers or distributors within the Commonwealth of Virginia any milk for resale, but purchases solely and entirely from the plaintiff corporation all of the bottled milk which is sold in his stores as aforesaid.

10. The plaintiff Luther W. High sells approximately 3,460 gallons of milk monthly in the Arlington-Alexandria area, in the Commonwealth of Virginia, to the general public at retail, in units and at prices as follows:

Milk, 4% butterfat	10¢ per quart.
Cultured wholemilk	8¢ per quart.
Chocolate milk	5¢ per pint.
Cream 20% butterfat	25¢ per pint.
	13¢ per half pint.
Cream 40% butterfat	35¢ per pint.
	18¢ per half pint.

By maintenance of said units and prices the plaintiff has built up a large and lucrative business and has established in the community in which he does business a reputation for quality as high as that of any of his competitors and for prices substantially lower.

11. The plaintiff Luther W. High has obtained all licenses and permits required by the sanitary laws and regulations effective in the Commonwealth of Virginia and each city or county therein wherein he conducts his business for the lawful conduct of his said business and he has kept, observed and performed all of the provisions of said sanitary laws and regulations.

12. On or about March 29, 1934, the Governor of the Commonwealth of Virginia approved Chapter 357 of the laws of Assembly of Virginia, Session 1934, enacted by the legislature of the Commonwealth of Virginia. A copy of the said chapter is annexed hereto and marked "Exhibit A" and made a part hereof.

[fol. 6] 13. In and by the said chapter, a new temporary state agency known as the Milk Commission was created and was given full power inter alia to regulate all matters pertaining to the production, transportation, processing,

storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

14. In said chapter, it was provided in Section 1, that a "market" means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory, designated by the Commission as a natural marketing area.

15. Each of said plaintiffs are distributors, within the meaning of said chapter, wherein it is provided in said Section 1, that a distributor means any of the following persons engaged in the business of distributing, marketing or in any manner handling fluid milk, in whole or in part, in fluid form for consumption in the Commonwealth of Virginia:

"I. Persons, irrespective of whether any such person is a producer:

(a) who pasteurize or bottle milk or process milk into fluid milk;

(b) who sell and/or market fluid milk at wholesale or retail

(1) to hotels, restaurants, stores or other establishments for consumption on the premises
(2) to stores or other establishments for resale, or
(3) to consumers:

(c) who operate stores or other establishments for the sale of fluid milk at retail for consumption off the premises

"II. Persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia."

16. In said chapter it is provided in Section 3, subsection [fol. 7] (j) that the said Milk Commission, after public hearing and investigation, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, provided that in determining the reasonableness of prices to be paid or charged in any market or markets, the Commission shall be guided by the cost of produc-

tion and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the price of other foods, and the welfare of the general public.

17. In said chapter it is provided in Section 3, subsection (k) that the said Commission may require all distributors to be licensed by the said Commission; and by Section 5, of said chapter, it is further provided that an application to the Commission for a license to operate as a distributor shall be made within five days after the provisions of said Act become effective in a market.

18. In said chapter it is provided in Section 4 thereof that no distributor in a market in which the provisions of this Act are in effect, shall buy milk from producers or others for sale within the Commonwealth, or sell or distribute milk within the Commonwealth unless such distributor is duly licensed, under the provisions of the Act. It is further provided therein that it shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed, as required by the said Act, and that it shall be unlawful for any distributor to deal in or handle milk if such distributor has reason to believe it has previously been dealt in or handled in violation of the terms and provisions of the said Act. Since the designation of the Arlington-Alexandria Milk Market by the said Commission, as will hereinafter more fully appear, and the said chapter having become operative in said market, and the [fol. 8] plaintiffs being distributors as defined in the said chapter (Paragraph 15 herein), the effect of said Section 4 is to prohibit the individual plaintiff from buying milk from the plaintiff corporation situated and doing business beyond the Commonwealth of Virginia, unless said corporation shall obtain, which it has not, a license from said Commission, thereby resulting in interference with and burdening of interstate commerce. The aforesaid provision is inextricably interwoven with Section 3, subsection (j) of said Act under which the Milk Commission has attempted to establish Regulation No. 4, hereinafter referred to, prescribing retail and wholesale minimum selling prices in the Arlington-Alexandria Sales Area.

19. Demand has been made upon the plaintiff Luther W. High, through the manager of one of his said stores in

said market area that the plaintiff Luther W. High procure a distributor's license from defendants, but neither of the plaintiffs have applied for a license as required.

20. In said chapter it is provided in Sections 8 and 13 that any person (defined by said chapter as person, firm, corporation or association) who shall violate any provision of said chapter, shall be subject to certain money penalties, and imprisonment, in said sections more particularly set forth.

21. In said chapter it is further provided in Section 3, subsection (i) that "The Commission shall not exercise its powers in any market, until a public hearing has been held for such market and the Commission determines that it will be to the public interest that it shall so exercise its powers in such market. The Commission may on its own motion call such hearing and shall call such hearing upon the written application of a producers' association, organized under the cooperative marketing act of the Commonwealth of Virginia, supplying in the judgment of the Commission a substantial proportion of the *of the* milk con-
[fol. 9] sumed in such market."

22. Pursuant to the foregoing provisions of said chapter a public hearing was called for the Arlington-Alexandria Milk Market "upon the request of a petition submitted by the Virginia and Maryland Milk Producers' Association" and said hearing was held on February 20, 1936, as aforesaid. The particular market, to-wit, the Arlington-Alexandria Milk Market was not established until some time subsequent thereto, on to-wit, April 1, 1936, as appears from said rules and regulations hereinafter referred to as "Exhibit C", a full and complete copy of the minutes and entire proceedings of said public hearing being annexed hereto and marked "Exhibit B" and made a part hereof. At said hearing there was no sufficient, adequate or bona fide public hearing and investigation held by the said Commission to guide it in determining the reasonableness of prices and particularly the retail prices of milk, in that no inquiry was held as to the cost of production and distribution, including compliance with all sanitary regulations in force in said market, necessary operation, processing, storage and delivery charges, the price of other foods, and the welfare of the general public; that the said hearing

failed to comply with the provisions of Section 3, subsection (j) of the said Chapter (Paragraph 16 herein), and was insufficient, and inadequate and in disregard of the said provisions of the said Chapter, in that as appears from the minutes of said hearing, "Exhibit B", the said Commission failed wholly to determine as a condition precedent to the fixing of minimum and maximum wholesale and retail prices to be charged for milk in the Arlington-Alexandria Milk Market and to the exercise of the other powers of the said defendants in said market, that the exercise of such powers would be to the public interest; and as further appears from said minutes of said hearing, that the said defendants did not take any evidence, or make any effort to investigate, and [fol. 10] failed and omitted to inquire into the reasonableness of prices to be paid or charged in the said market and failed and omitted to inquire into the costs of production and distribution, including compliance with all sanitary regulations in force in said market, the necessary operation, processing, storage, delivery charges, the price of other food and the welfare of the general public. Such failure was in violation of the express requirements of Section 3, subsection (j) of said Act and a denial of due process of law in violation of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

23. Thereafter and without further public hearing and investigation, the defendants, as the said Milk Commission, on, to-wit, March 27, 1936, promulgated and adopted certain rules and regulations for the supervision and control of the Arlington-Alexandria Milk Market, effective April 1, 1936, a copy of which is annexed hereto and marked "Exhibit C" and made a part thereof. Said effective date was subsequently postponed to and until June 1, 1936, and on said date the said Chapter, and the rules and regulations adopted pursuant thereto became effective in the said market. Said rules and regulations arbitrarily and capriciously fix and establish minimum prices to be paid by milk distributors to producers for milk in accordance with a classified price plan, which price plan was and is based upon the ultimate utilization by the purchasers of said milk. Said rules and regulations establish minimum wholesale and retail prices, below which distributors may not purchase or sell milk in wholesale quantities, or sell milk at retail; said

minimum wholesale and retail prices are set forth in said "Exhibit C", as Regulation No. 4.

24. The plaintiff corporation has continuously sold milk to the plaintiff Luther W. High at prices lower than the minimum, established as aforesaid, and the plaintiff Luther [fol. 11] W. High has continuously sold milk to the general consumer public at prices lower than the minimum established as aforesaid.

25. In Regulation No. 6 of said rules and regulations, it is provided that a distributor shall pay to the Milk Board all assessments levied on him by the Milk Board, except on the milk which has been purchased from licensed distributors, and said regulation providing for the levying of assessments on a distributor for milk which has not been purchased from a licensed distributor operates to require the plaintiff Luther W. High to pay duty on milk purchased from the plaintiff corporation in the District of Columbia, in interstate commerce, thereby imposing upon the purchase of milk by said plaintiff, Luther W. High, in interstate commerce an assessment which he would not have to pay on purchases made from distributors within the Commonwealth of Virginia.

26. The penalties attached to a violation of the provisions of the said Chapter, or of the rules and regulations promulgated by said Commission are so great that the plaintiff corporation may not purchase, within the Commonwealth of Virginia milk or cream necessary to be used in the course, conduct and operation of its business as aforesaid, and that the plaintiff Luther W. High may not sell, within the Commonwealth of Virginia, milk or cream purchased from the plaintiff corporation without the State, at a price lower than that required to be paid to distributors for milk and cream sold within the State, and that neither plaintiff may sell within the Commonwealth of Virginia milk or cream purchased from distributors without the State, in interstate commerce, at a price lower than that fixed by the said Milk Commission for the minimum prices within the State, and unless this Court shall determine the validity of the said Chapter, and of the rules and regulations promulgated pursuant thereto by the said Milk Commission, each of said plaintiffs will be compelled to submit to said Chapter and to

said rules and regulations promulgated pursuant thereto by [fol. 12] the said Milk Commission, whether the same be valid or invalid, and each of the plaintiffs will be deprived of his and its respective property without due process of law, and will be denied the equal protection of the laws, in violation of the provisions of the Constitution of the United States:

A. In that the said Chapter 357, in particular Sections 8 and 13 thereof, prescribe such penalties for the violation or disregard of the provisions of the Act and the regulations of the Commission as to deter, and therefore prohibit, the parties affected from asserting their constitutional rights and making a test thereof, particularly in view of the absence of any provision in said Act for an adequate judicial review of the rules and regulations of the Commission.

B. In that the said Chapter 357 and the rules and regulations adopted pursuant thereto, as aforesaid, as interpreted in their administration by the said defendants is an attempt to interfere with and prohibit the plaintiff corporation from shipping milk and the individual plaintiff from importing milk into the Commonwealth of Virginia from the District of Columbia and contravene the provisions of the United States Constitution, Article I, Section 8, providing that Congress shall have the power to regulate commerce among the several states and are void and unconstitutional.

C. In that the said Chapter 357 and the rules and regulations adopted pursuant thereto as aforesaid, as interpreted in their administration by the said defendants, in requiring plaintiff corporation to purchase milk only at a price fixed by the defendants when as a part of such purchases, the seller shall ship and export said milk outside of the Commonwealth, and contravene the provisions of the United States Constitution, Article 1, Section 8, providing that Congress shall have the power to regulate commerce [fol. 13] among the several states and are void and unconstitutional.

D. In that the said Chapter 357 and the rules and regulations adopted pursuant thereto, as aforesaid, as interpreted in their administration by the said defendants in requiring plaintiff Luther W. High to purchase milk for

resale in the Commonwealth of Virginia only at a price fixed by the defendants, when such purchases are made outside of the Commonwealth of Virginia, contravene the provisions of the United States Constitution, Article 1, Section 8, providing that Congress shall have the power to levy imposts and duties upon products coming in from another state and are void and unconstitutional.

E. In that the said Chapter 357 and the rules and regulations adopted pursuant thereto, as aforesaid, as interpreted in their administration by the said defendants by requiring plaintiff Luther W. High to pay an assessment on milk purchased from the plaintiff corporation in interstate commerce, contravene the provisions of the United States Constitution, Article 1, Section 8, providing that Congress shall have the power to levy imposts and duties upon products coming in from another state, and are void and unconstitutional.

F. In that the said Chapter 357 and the rules and regulations adopted pursuant thereto, as aforesaid, as interpreted in their administration by the said defendants are arbitrary interf-ence with the freedom of contract and are attempts to render invalid the present and existing contracts for the purchase and sale of milk and cream heretofore made by and between the plaintiff corporation and the farmers, producers or milk sheds located in the Commonwealth of Virginia, and contravene the provisions of the Fourteenth Amendment to the United States Constitution, providing that no person shall be deprived of property without due process of law.

G. In that the said Chapter 357 and the rules and regula- [fol. 14] tions adopted pursuant thereto, as aforesaid, as interpreted in their administration by the said defendants are arbitrary interference with the freedom of contract and are attempts to render invalid the present and existing contracts for the purchase and sale of milk and cream heretofore made by and between the plaintiff Luther W. High and the plaintiff Highland Farms Dairy, Incorporated, located in Washington, in the District of Columbia, and contravene the provisions of the Fourteenth Amendment to the United States Constitution providing that no person shall be deprived of property without due process of law.

H. In that transactions between the plaintiff Luther W. High and the plaintiff Highland Farms Dairy, Incorporated, from which he purchases his milk and cream, are conducted and consummated in Washington, in the District of Columbia, and constitute interstate commerce and are not subject to the jurisdiction, direction or control of the Milk Commission of the Commonwealth of Virginia, represented by the defendants herein.

I. In that the said Chapter 357 and the rules and regulations adopted pursuant thereto, as aforesaid, as interpreted in their administration by the said defendants are void and unconstitutional for the reason that said rules and regulations are unreasonable, arbitrary and capricious, have no reasonable relation in their operation and effect to the purpose of the said Commission and deprive the plaintiffs and each of them of their property rights in contravention of the provisions of the Fourteenth Amendment to the United States Constitution.

J. In that the said Chapter 357 and the rules and regulations adopted pursuant thereto, as interpreted in their administration by the said defendants are void and unconstitutional for the reason that the conduct of the said hearing of February 20, 1936, and the findings and conclusions adopted thereat were insufficient, inadequate and arbitrary and in violation of the requirements provided by said chapter, and constitute a denial of due process of law to the [fol. 15] plaintiffs and each of them in that there was a failure on the part of the said defendants to determine at such hearing that it will be to the public interest to exercise its powers in the Arlington-Alexandria milk market and in that further no inquiry was made into the cost of production and distribution, compliance with sanitary regulations, necessary operation, processing, storage and delivery charges, the price of other foods and the welfare of the general public, in contravention of the Fourteenth Amendment to the United States Constitution.

27. The General Assembly of Virginia in the enactment of Chapter 357, to support the Act, included a preamble in which it is declared that an economic emergency existed to relieve which and to protect the well-being of the people of the Commonwealth, the sale of milk and cream was declared to be a business affecting the public peace, health and wel-

fare. The Act was based upob the existence of a period of public emergency. There is no record or recital, however, of any breakdown in the enforcement of the sanitary and health controlling regulations, amply provided for in the then existing statutes with respect to the production and sale of milk within the Commonwealth. The provisions of the Act contain no regulations or requirements looking to sanitary measures and health protection but recognize the existence of laws and ordinances relating to the production, delivery, transportation, distribution and sale of milk in the State Sanitary Code and regulations adopted by the Dairy and Food Division and by the Boards of Health of counties and municipalities. The preamble, together with the provisions of the Act, clearly indicate the effort to deal with an economic emergency.

While the Act of the Legislature declared the existence of this emergency throughout the Commonwealth, the deter- [fol. 16] mination of the existence of such emergency in any part, and therefore in all of the State, was in said Act delegated to the Milk Commission, for no provision required the Commission to establish milk areas or prescribe prices or rules and regulations except as may be determined by the Milk Commission after hearings thereafter to be held.

Under the provisions of Section 2 the power of the Milk Commission is to first establish an area and then prescribe prices and regulations for the conduct of the business therein. The Commission is fully empowered first to create such areas and then at any time to withdraw the exercise of powers from any market. It is obviously, from the Act, within the power of the Commission to establish areas everywhere and nowhere, and the records of the Commission will show that there are large areas, particularly certain cities, including the City of Richmond, where no action has been taken by the Milk Commission to establish areas or to regulate the market. Instead, therefore, of the Legislature having exercised its sovereign right to declare emergencies and to make provision therefor, it has unlawfully and in violation of the Constitution of the Commonwealth of Virginia, and in particular, Article 4th, which vests the legislative power in the General Assembly, delegated this sovereign power to the Milk Commission.

28. Under Section 40, Article IV, of the Constitution of Virginia, it is expressly provided that—

"The legislative power of the State shall be vested in the General Assembly which shall consist of a Senate and a House of Delegates."

The delegation of certain legislative powers, in particular the regulations of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, is provided for in the Constitution of Virginia in Section 156, [fol. 17] such delegation being to the State Corporation Commission of Virginia. This provision of the Constitution delegated the authority immediately in connection with rates and charges of transportation and transmission companies and provided that the said Commission might be vested with the same power of regulation with respect to "rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges", but no authority to grant such power to any other body than the State Corporation Commission was made in the Constitution. So that the attempted delegation by the General Assembly of the right to prescribe rates and charges to the Milk Commission rather than to the State Corporation Commission, in connection with the distribution and supply of milk was and is void.

29. By reason of the enforcement of the provisions of said Milk and Cream Act and the rules and regulations promulgated by the Milk Commission, as herein set forth, the business of each plaintiff as a distributor in the Commonwealth of Virginia is and will continue to be threatened with irreparable loss if not total destruction. The individual plaintiff's business in the said Arlington-Alexandria Sales Area has, in the course of years, been developed on the basis of high quality, efficient service, and low prices, which prices are substantially lower than the prices of his competitors and the minimum prices prescribed by Regulation No. 4 of the Milk Commission. The ability of said individual plaintiff to perform the service and make delivery at the prices aforesaid has been due to his ability to make purchases of necessary supplies of milk from the plaintiff corporation and the operation of his business with a high degree of efficiency and economy. The continuance of said individual plaintiff's business on a profitable basis is dependent upon adherence to the methods which have

been heretofore adopted and the maintenance of the lower [fol. 18] scale of prices than those maintained by his less efficient competitors. A substantial reduction in volume of business will necessarily follow the inability of the individual plaintiff to continue to sell at the scale of prices heretofore maintained by him, will render it impossible for him to continue his business and thereby result in great loss to the individual plaintiff and to the plaintiff corporation.

30. Neither plaintiff has a plain, adequate or complete remedy at law, and resort must be had for relief to a court of equity.

Wherefore, upon consideration of the premises and inasmuch as each plaintiff can have adequate relief only in a court of equity, each plaintiff prays:

1. That an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the defendants, J. S. Agnew, Chairman, and Kone Brugh and T. R. Snavely, as the members of the Milk Commission of the Commonwealth of Virginia, and each of them:

A. From enforcing or exercising its, or any of its powers in the Arlington-Alexandria Milk Market.

B. From making, adopting, enforcing, promulgating or putting into effect rules, regulations or orders for the supervision and control of the Arlington-Alexandria Milk Market.

C. From exercising its powers, enforcing or putting into effect in the Arlington-Alexandria Milk Market, rules, regulations, or orders, fixing minimum wholesale and retail prices to be charged for milk, requiring distributors to be licensed, or levying assessments against a distributor for milk which has not been purchased from a licensed distributor.

2. That the said Chapter 357 and the said rules and regulations adopted pursuant thereto, insofar as said Chapter 357 and said rules and regulations,

A. Prohibit or restrain plaintiff corporation from pur- [fol. 19] chasing milk in the Commonwealth of Virginia for interstate shipment or from selling milk to a distributor in the Commonwealth of Virginia in interstate commerce, unless said plaintiff shall be licensed; and

B. Prohibit or restrain plaintiff Luther W. High from purchasing or selling, within the Commonwealth of Virginia, milk which has been dealt in or handled by an unlicensed distributor, without the Commonwealth, unless said plaintiff shall be licensed; and

C. Prohibit or restrain plaintiff Luther W. High from purchasing milk, for sale within the Commonwealth of Virginia, or from selling milk within the Commonwealth of Virginia unless said plaintiff shall be licensed; and

D. Prohibit or restrain plaintiff Luther W. High from selling within the Commonwealth of Virginia milk purchased by said plaintiff without the Commonwealth of Virginia; and

E. Prohibit or restrain either plaintiff from purchasing or selling within the Commonwealth of Virginia, milk purchased without the Commonwealth at prices below the minimum established by said rules and regulations; and

F. Levy, or authorize the levy of assessments against plaintiff Luther W. High for milk purchased without the Commonwealth of Virginia from an unlicensed distributor; be declared to be unconstitutional, illegal and void, in that they violate the provisions of Article 1, Section 8, and of the Fourteenth Amendment to the Constitution of the United States, by attempting to regulate commerce between the several states, by attempting to levy imposts and duties upon products coming from another state and by depriving each plaintiff of his or its property without due process of law, and by depriving each plaintiff of the equal protection of the laws and that an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining [fol. 20] the enforcement of said Chapter, rules and regulations as hereinabove prayed.

3. That a writ, or writs of subpoena be directed to the said defendants J. S. Agnew, Chairman, and Kone Brugh and T. R. Snavely, as the members of the Milk Commission of the Commonwealth of Virginia, and each of them, commanding them, at a certain time to be and appear before this Honorable Court, then and there to answer the matters aforesaid, but not under oath, answer under oath being expressly waived, and to abide by and perform such other and further orders as to the Court shall seem meet.

4. That a hearing and determination of the application for an injunction may be made, pursuant to the provisions of Sections 380, 381 and 382 of Title 28, U. S. Code (Judicial Code, Section 266 Amended) before three judges, one of whom at least shall be a Circuit Judge of the United States as provided in said Section 380.

5. That a copy of the amended bill of complaint and of such order of injunction, temporary or permanent as may be granted, be served upon the Honorable George E. Peery, Governor of the Commonwealth of Virginia, and upon the Honorable Abram P. Staples, Attorney General of the Commonwealth of Virginia, as provided by said Section 380 of Title 28 of U. S. Code.

6. That each plaintiff may have such other and further relief in the premises as the nature of the case may require and as may be in accordance with Equity.

Highland Farms Dairy, Incorporated, by (Sgd.) C. Y. Stephens. Luther W. High. (Sgd.) Hunton, Williams, Anderson, Gay & Moore, Electric [fol. 21] Building, Richmond, Virginia; (Sgd.) Philip Rosenfeld, Woodward Building, Washington, D. C., Solicitors for Plaintiffs.

Duly sworn to by Luther W. High and C. Y. Stephens. Jurats omitted in printing.

[fol. 22] EXHIBIT "A" TO COMPLAINT

Milk and Cream Act

An Act to Provide for the Supervision, Regulation and Control of the Production, Processing, Transportation, Storage, Distribution, and Sale of Milk and Cream; to Create a Milk Commission and Local Milk Boards and to Define and Provide for the Functions, Duties and Powers Thereof.

[Seal Virginia]

Reprinted from Acts of Assembly, Session 1934

[Chapter 357]

Richmond Division of Purchase and Printing 1935

[fol. 23] Milk and Cream Act

Chap. 357.—AN ACT to provide for the supervision, regulation and control of the production, processing, transportation, storage, distribution, and sale of milk and cream; to create a Milk Commission and local milk boards and to define and provide for the functions, duties and powers thereof; to provide for the appointment, suspension, removal, compensation, costs, and expenses of such commission and boards and the members, officers, agents and employees thereof; to provide for licensing processors, bottlers, wholesalers, distributors, and retailers of milk and cream, or either; to provide for the raising of funds for the administration of this act and to provide for the disposition of revenue collected hereunder and to impose penalties for violation of the provisions of this act.

[H B 396]

Approved March 29, 1934

Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which dis-

parity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political subdivisions thereof; and

Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth; and

Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; now, therefore,

1. Be it enacted by the General Assembly of Virginia, as follows:

Section 1. Definitions.—As used in this act, unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

"Person" means any person, firm, corporation or association.

"Commission" means the milk commission created by this act.

[fol. 24] "Distributor" means any of the following persons engaged in the business of distributing, marketing, or in any manner handling fluid milk, in whole or in part, in fluid form for consumption in the Commonwealth of Virginia:

I. Persons, irrespective of whether any such person is a producer:

(a) who pasteurize or bottle milk or process milk into fluid milk;

(b) who sell and/or market fluid milk at wholesale or retail

(1) to hotels, restaurants, stores or other establishments for consumption on the premises

(2) to stores or other establishments for resale, or

(3) to consumers;

(c) who operate stores or other establishments for the sale of fluid milk at retail for consumption off the premises.

II. Persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia.

"Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk for sale as fluid milk in the Commonwealth of Virginia.

"Producer-distributor" means a distributor who handles only milk produced by himself.

"Consumer" means any person, other than a milk distributor who purchases milk for human consumption.

"Market" means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area.

"Licensee" means a licensed milk distributor.

"Milk" means the clean lacteal secretion obtained by the complete milking of one or more healthy cows properly fed, housed and kept; including milk that is cooled, pasteurized, standardized or otherwise processed with a view of selling it as fluid milk, cream, buttermilk (either cultured or natural buttermilk, and including cultured whole milk in its several trade forms) and skimmed milk; said term excludes the lacteal secretion of one or more dairy animals where lacteal secretion is sold or intended to be sold for any other purpose.

"Subsidiary" means any person of, or over whom or which a distributor or an affiliate of a distributor has, or several distributors collectively have, either directly or indirectly, actual or legal control, whether by stock ownership or in any other manner.

"Affiliate" means any person and/or subsidiary thereof, who has, either directly or indirectly, actual or legal con-

trol, over a distributor, whether by stock ownership or in any other manner.

[fol. 25] "Board" means the local agency authorized by this act to administer the operation of the act in each market area operating under the provisions of this act, to be known as the "milk board" of the particular market area in which it functions.

"Books and records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence, or other data, pertaining to the business of the person in question.

"Health authorities" includes the State Board of Health, the Virginia Dairy and Food Division of the State Department of Agriculture and Immigration and the Director thereof, and the local health authorities.

"Sanitary regulations" includes all laws and ordinances relating to the production, handling, transportation, distribution and sale of milk and, so far as applicable thereto, the State sanitary code and lawful regulations adopted by the dairy and food divisions, or by the board of health of any county or municipality.

Section 2. Milk Commission.—(a) There is hereby created a Milk Commission, consisting of three members, two of whom shall be producers of milk who are not directly or indirectly engaged in the distribution thereof, and the third member shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom, who shall be appointed by the Governor of Virginia to hold office at the pleasure of the Governor and may be removed at any time by the Governor. Any vacancies occurring shall be filled by appointment by the Governor. One member of said commission shall act as chairman, as designated by the Governor. The technical and other services for such commission shall be performed, so far as practicable, by forces and officers in the Department of Agriculture and Immigration, the Virginia Agricultural Extension Division of the Virginia Agricultural Experiment Station, without additional compensation. The Milk Commission may appoint and, at pleasure, remove the secretary of the Milk Commission and any such additional technical and other assistants and employees as may be necessary to carry out the provisions of this act, and to prescribe their powers and duties.

(b) The members of the Milk Commission shall be paid each the sum of ten dollars per day for each day actually spent in the performance of their official duties, plus their actual and necessary expenses.

(c) The commission shall fix the compensation of the secretary of the Milk Commission and other employees.

(d) The secretary shall, subject to the limitations herein contained and the rules and regulations of the commission, enforce the provisions of this act, but no official act shall be taken, rule or regulation be promulgated, or official order made or enforced, with respect to the provisions of this act, without the approval of the majority of the members of the commission.

[fol. 26] (e) The principal offices of the commission shall be in the city of Richmond, in rooms assigned by the Director of the Division of Grounds and Buildings.

(f) Two members of the commission shall constitute a quorum.

Section 3. Powers.—The commission is hereby declared to be an instrumentality of the Commonwealth, vested with power:

(a) To confer and co-operate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, with respect to milk coming into the Commonwealth and going out of the Commonwealth in interstate commerce, with a view of accomplishing the purposes of this act, and to enter into a compact or compacts for such uniform system of milk control.

(b) To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia.

(c) To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

(d) To act as mediator or arbiter in any controversial issue that may arise among or between milk producers and

distributors, as between themselves, or that may arise between them as groups.

(e) To examine into the business, books and accounts of any milk producer, association of producers or milk distributors, their affiliates or subsidiaries; to issue subpœnas to milk producers, associations of producers, and milk distributors, and to require them to produce their records, books and accounts; to subpœna any other person from whom information is desired.

(f) To take depositions of witnesses within, or without, the Commonwealth. Any member of the commission, or any employee designated by the commission, may administer oaths to witnesses and sign and issue subpœnas.

(g) To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the purposes of this act. Every rule or order of the commission shall be posted for inspection in the main office of the commission, and a certified copy filed in the office of the Commissioner of Agriculture. An order, applying only to a person or persons named therein, shall be served on the person or persons affected. An order, herein required to be served, shall be served by personal delivery of a certified copy, or by mailing a certified copy in a sealed envelope, with postage prepaid, to each person affected thereby; or, in the case of a corporation, to any officer or agent of the corporation upon whom legal process may be served. The posting in the main office of the commission of any rule and of any order, not herein required to be served, and such filing in the office of the Commissioner of Agriculture, shall constitute due [fol. 27] and sufficient notice to all persons affected by such rule or order.

(h) The operation and effect of any provision of this act conferring a general power upon the commission shall not be impaired or qualified by the granting to the commission by this act of a specific power or powers.

(i) The commission shall not exercise its powers in any market until a public hearing has been held for such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market. The commission may, on its own motion, call such hearing, and shall call such hearing upon the written application of

a producers' association organized under the co-operative marketing act of the Commonwealth of Virginia, supplying in the judgment of the commission a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors, distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission may withdraw the exercise of its powers from any market after a public hearing has been held for such market, and the commission determines that it will be to the public interest to withdraw the exercise of its powers from such market. The commission may on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of Virginia, supplying in the judgment of the commission, a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly.

(j) The commission, after public hearing and investigation, may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may [fol. 28] also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade,

quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public.

(k) The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the Commonwealth.

(l) Any member of the commission, or employee designated for the purpose, shall have access to, and may enter at all reasonable hours, all places where milk is stored, bottled or manufactured into food products. Any member of this board, or designated employee shall have the power to inspect books and records in any place within the Commonwealth for the purpose of ascertaining facts to enable the board to administer this act, and all such information shall be confidential, unless the parties concerned agree to its being given out. The commission may combine such information for any market or markets and make it public.

(m) The commission may define what shall constitute a natural market area and define and fix the limits of the milkshed or territorial area within which milk shall be produced to supply any such market area; provided, that producers, producer-distributors, or their successors now shipping milk to any market may continue so to do until they voluntarily discontinue shipping to the designated milk market.

(n) The commission may delegate such of the powers given it by this act as it sees fit to the milk board in any particular market area, for the purpose of carrying out the provisions of this act within said market area.

(o) Each licensee shall, from time to time, as required by the commission, furnish to the commission verified re-

ports containing such information as the commission may require.

Section 4. No distributor in a market in which the provisions of this act are in effect shall buy milk from producers, or others, for sale within the Commonwealth, or sell or distribute milk within the Commonwealth, unless such distributor is duly licensed under the provisions of this act. It shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required [fol. 29] by this act. It shall be unlawful for any distributor to deal in, or handle milk if such distributor has reason to believe it has previously been dealt in, or handled, in violation of the terms and provisions of this act.

Section 5. An application to the commission for a license to operate as a distributor shall be made by mail or otherwise within five days after the provisions of this act become effective in a market, and as to any distributor thereafter beginning business, before such distributor shall begin such business therein. The application shall be made on blanks furnished by the commission for the purpose.

Section 6. Any order of the commission in refusing to issue a license, or suspending or revoking, a license, may be reviewed on appeal to the Supreme Court of Appeals.

Section 7. The licenses required by this act shall be in addition to any other licenses required by existing laws of the Commonwealth of Virginia or by any municipal ordinance. Nothing in this act shall be construed to conflict with or repeal any laws now in force in the Commonwealth of Virginia relating to any board of health or sanitary code now in force in this Commonwealth or in any municipality thereof, nor any municipal ordinances relating to the inspection, grading, production, sale or distribution of milk.

Section 8. Any person failing or refusing to comply with any subpœna issued by the commission or pursuant to its authority, shall be deemed guilty of a misdemeanor, and upon conviction, may be punished by a fine not exceeding one hundred dollars or by imprisonment not exceeding ninety days, or both, and each day during which such violation shall continue shall be deemed a separate offense. In the event any person shall fail to comply with any rule, regulation or order of the Commission, or obey any sub-

pœna issued thereby, or in the event of the refusal of any witness to testify to any matter concerning which he lawfully may be interrogated by the commission or its representative, it shall be the duty of the hustings court of the city of Richmond, or judge thereof, upon application of the commission, to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpœna issued from said court, refusal to testify therein, or disobedience of an order or decree of such court. The proceedings herein authorized in the hustings court to compel obedience shall be in addition to the provisions of this section defining what shall constitute a misdemeanor and providing and prescribing the punishment therefor.

Section 9. The Milk Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the local milk boards in the form of monthly assessments, and the local milk boards shall pay the assess-[fol. 30] ments so levied. The assessments so levied shall not exceed two cents per hundred pounds of milk handled in each market in which the provisions of this act are in operation.

Section 10. All receipts from assessments paid under this act shall be paid by the commission to the State Treasurer and shall be placed by the State Treasurer in the general fund to the credit of an account to be known as the "Milk Commission account" and such amount as may be necessary, and no more, hereby is appropriated out of such Milk Commission account for the payment of all expenses incurred by the Milk Commission in administering and enforcing this act.

Section 11. Local milk boards.—(a) Members. For the purpose of securing the benefits of this act, in any market area, the producers and distributors and producer-distributors in that market area shall establish a milk board of five members to carry out the provisions of this act in conjunction with the State Milk Commission. Each local milk board shall be composed of two representatives of the producers supplying milk to the market, one of whom shall be named by the producers' co-operative marketing association operating in the market, and in markets where the producers' co-operative market association handles the selling

of fifty per centum or more of the milk, the association shall have the right to name both representatives of the producers on the milk board; and two representatives of the distributors operating in the market.. In markets where producer-distributors handle fifty per cent or more of the milk used in the market the Milk Commission shall determine the representation of the producers, the producer-distributors and distributors on the milk board on a basis fair to all parties.

The Milk Commission shall appoint the fifth member of the milk board to represent the consumers and the public interest, who shall serve as chairman of the board. The representative of the consumers and the public interest shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom.

(b) Expenses. The expenses of the milk board, including salaries and/or the per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this act, and including the assessments levied by the State Milk Market Commission, shall be met by an assessment of not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) sold by producers. The exact amount of each monthly or semi-monthly assessment shall be determined by the milk board as necessary to cover its expenses. All assessments shall [fol. 31] be paid at the time the distributors pay the producers for the milk. All officers and employees of the milk board who handle funds of the board, or who sign or countersign checks upon such funds, shall severally give bond in such amount and with such sureties as shall be determined by the milk board. The cost of such bonds shall be paid by the milk board and the milk board shall determine the amount and sufficiency of such bonds.

(c) Powers.—The milk board shall perform such functions as the Milk Commission shall delegate to it.

Section 12. In the event of violation of any provision of this act, in addition to any other remedy, the commission may apply to any court of record in the city of Richmond

for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist.

Section 13. Penalties.—Any person violating any provision of this act or of any license issued by the commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, and each day during which such violation shall continue shall be deemed a separate violation. Prosecutions for violating the provisions of this act shall be instituted by the Commonwealth's attorney of the Commonwealth, or otherwise, in any county or city of the Commonwealth of Virginia in which the provisions of this act are in effect.

Section 14. Saving clause.—No provision of this act shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

Section 15. Conflicting laws.—The making of marketing agreements between producers' co-operative marketing associations and distributors and producer-distributors under the provisions of this act shall not be deemed a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily nor shall the marketing contract or agreements between the association and the distributors and producer-distributors, or any agreements authorized in this act, be considered illegal or in restraint of trade. All laws or parts of laws in conflict with the provisions of this act are hereby repealed to the extent necessary for the full operation of this act.

Section 16. Constitutionality.—If any section, clause, or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby.

Section 17. Termination.—The period of public emergency during which this act shall be effective shall be until

such date as the Legislature may, by joint resolution, designate to be the termination thereof, or if the Legislature be not in session the date so designated by a proclamation of the Governor.

2. An emergency existing, this act shall be in force from its passage.

[fol. 32] EXHIBIT "B" TO COMPLAINT

Arlington-Alexandria Public Hearing

February 20, 1936.

The public hearing for the Arlington-Alexandria market was held in the John Marshall Hotel, Richmond, Virginia, at Ten o'clock a. m., Thursday, February 20, 1936. The Virginia Milk Commission composed of J. S. Agnew, chairman, Kone Brugh, and T. R. Snavely were present for this hearing.

The attendance of the hearing consisted of the following dairymen:

B. B. Derrick, C. F. Bletch, Frank S. Walker, R. L. Torreyson, G. Wallace Carper, B. B. Iden, Mark Turner, J. H. Carper, Thomas Elgin, Maryland and Virginia Milk Producers' Association.

M. V. Davison, Chestnut Farms Dairy, Washington, D. C.

A. L. Thompson, Thompson's Dairy, Washington, D. C.

M. A. Burchell, Alexandria Dairy Products Company, Alexandria, Va.

W. S. Snow, Attorney, Alexandria Dairy Products Company.

P. H. Berenter, Auditor, Alexandria Dairy Products Company.

J. Marcey, Arlington County Dairy, Clarendon, Va.

Frank Davis, Marcey Dairy, Clarendon, Va.

W. A. Hazel, Falls Church, Va.

Sam Fagelson, producer, Alexandria, Va.

A. J. Storm, Merchant, Alexandria, Va.

G. V. Carper, Milk hauler, Alexandria, Va.

Mr. Agnew opened the meeting by explaining that the hearing was called upon the request of a petition submitted by the Virginia and Maryland Milk Producers' Association.

He further explained that legal notices were sent to the weekly paper in Falls Church and to the Alexandria Gazette, and that letters had been sent to the large distributors notifying them of the hearing. Mr. Agnew then called on Mr. Derrick of the Maryland and Virginia Milk Producers' Association:

Statements from Dairymen

Mr. Derrick: "I am going to submit a very brief brief to the Milk Commission of Virginia." He read and submitted the brief.

Mr. Bletch of the Maryland and Virginia Milk Producers' [fol. 33] Association read and presented to the Commission a tentative production area which Mr. Walker, pres-ent of the Association, stated was set up at the time they were considering the federal license. Mr. Agnew asked if there were any objections to the production area, as suggested, and there was no response.

Mr. Agnew then called on Mr. Davisson of Chestnut Farms Dairy.

Mr. Davison: "I am here merely as a spectator, we sell milk in the Virginia territory, but it is not all produced in that area. It will affect us, but we were not part of the committee that asked for the hearing."

Mr. Agnew: "Do you have any objections to the Commission's coming into your market."

Mr. Davison: "No objections whatsoever."

Mr. Agnew: "Mr. Thompson, Thompson's Dairy."

Mr. Thompson: "We are in the same category with Mr. Davison. We have a full contract with the Producers' Association. We have no objections to the regulations."

Mr. Agnew then called on Mr. Burchell of the Alexandria Dairy Products Company.

Judge W. S. Snow (representing Mr. Burchell): "This question has been completely discussed, and I have been in conference with Major Gibson and he feels, as I do, that no Milk Commission can control the price of milk in this area. That is, to regulate interstate milk." Judge Snow further explained that the Sanitary Grocery Company and the Atlantic and Pacific Grocery Company handled a very large quantity of milk in Alexandria, which of course they received at the wholesale price. This milk came from various points. Under state control, the regulated dairies could not compete with this unregulated milk which would certainly

be sold to these concerns. He stated further, "It would hurt us since the Sanitary Grocery and the Atlantic and Pacific Grocery are our largest customers and we feel that the establishment of milk control board in our area would [fol. 34] not be satisfactory."

Mr. Davison: "What would be the attitude of the "Judge" as to the wholesale price to stores?"

Judge Snow: "There is no way for you people to control the production since there is no way in the world to tell where this milk to stores is coming from. If we are "pegged" to a retail, wholesale, and buying price, we will just be lost!".

Mr. Agnew: "Does very much milk come in from Maryland?" Question unanswered.

Dr. Snavely asked the question in regard to health regulations in Washington. They were reported to be very stringent. General discussion followed.

Mr. Agnew: "Mr. Burchell, do you think it is worth the effort to try the regulations and do you think you could be any worse off than you are today?"

Judge Snow: "We can meet competition now, but if the prices are 'pegged', we will not be able to meet the prices. We can buy a cheap milk for manufacturing purposes, but under the proposed set up, we will not be able to do so. We are not against state control, but we believe that it will do us harm in so far as interstate control is concerned." Judge Snow gave illustration of Alexandria distributor going into Washington and getting his milk cheaper.

Mr. Agnew: "That is a question we must consider. We do not want to hinder you people, if we cannot help you. But how far could a man get by taking his orders from Washington?"

Judge Snow: "I do not know, but some people would do anything to get around the law. It is that type of competition that gets around the law, and ignores it."

Mr. Agnew: "Get down to practical application—If your local board finds a Washington distributor is selling milk [fol. 35] under the regulated price and an injunction is gotten out, the violator would have to prove where every bit of milk he got came from. Could he do that?"

Judge Snow: "I don't know, but I guess he could lie about that too."

Judge Snow at this time introduced Mr. Sam Fagelson, a producer, and one of Mr. Burchell's shippers:

Mr. Fagelson: "I represent the milk producers of Fairfax who ship their milk to Alexandria Dairy. I am only a producer. I ship my milk to Mr. Burchell. We are well satisfied now, and we do not know what will happen if conditions are changed. The people I represent told me to say that we have a market now, and we don't know what will happen if changed. We get the Washington price of 26½¢ per gallon."

Judge Snow: "We do not go into Arlington County, and we do not wish in any way to hinder your going into that area."

Mr. Agnew: "Mr. Burchell, if we take care of your manufacturing proposition, do you mind giving the regulations a trial?"

Mr. Burchell: "We would have to think about it."

Mr. Agnew then called on Mr. Hazel, an independent distributor in the vicinity of Falls Church.

Mr. Hazel: "I believe my position is a little different from any other representative of the various groups. I really am a small business man, and I can strongly endorse what Judge Snow had to say about the proposition. I am opposed to any form of price regulation. I think it is my freedom to sell milk any way I please. I want to go on record that I am absolutely opposed to any form of regulation."

Mr. Agnew: "What is your gallonage?"

Mr. Hazel: "500 to 600 gallons per day. I sell in a radius of about three square miles in the heart of Arlington [fol. 36] County."

Mr. Agnew: "Do you retail milk-"

Mr. Hazel: "Yes, and I have my own price which is the only way I can meet competition. I'm operating a small business and it is a close corporation. We own our own property and things are closely supervised. If we can sell milk at our own price and make a fair profit, I do not think anyone has anything to do with me. I have been in business about five years. There are a number of distributors in my area—practically all of the Washington distributors. Chestnut Farms has about fifteen wagons in our area, Thompson's Dairy has several, Marcey Bros. about five, the

Embassy has several and we have five. We have a fixed buying price and I pay my producers promptly. I pay as much for the last gallon of milk I buy, as I do for the first. My producers consist of those who do not have Washington permits, but only have state permits to sell milk."

Mr. Agnew: "What price do you pay your producers?"

Mr. Hazel: "20¢ per gallon for 4% milk, and a percentage of increase or decrease for all milk over or below 4%. I say again that I am very much opposed to any form of control."

Judge Snow: "I should like to go into the percentage of milk handled in Alexandria. Mr. Burchell handles about 2,000 gallons per day which is about 75% of the milk in Alexandria."

The following report was made:

Alexandria Dairy Products	2,000 gallons per day.
Arlington County Dairy	700 gallons per day.
Chestnut Farms Dairy	2,000 gallons per day.
Thompson's Dairy	480 gallons per day.
Hazel's Dairy	600 gallons per day.
Raw Milk P. D.	400 gallons per day.
Model Farms Dairy	100 gallons per day.
M. S. Good Dairy	300 gallons per day.
Embassy Dairy	400 gallons per day.

Mr. Derrick: "I think it would be of interest to know the retail price of various distributors."

Mr. Burchell: "Our price is 13¢ per quart."

[fol. 37] Mr. Agnew: "Do you attempt to meet competition?"

Mr. Burchell: "I have to in some cases."

Mr. Agnew: "Mr. Hazel, do you have your own price?"

Mr. Hazel: "Yes, I recognize my own prices."

Mr. Agnew: "How is High's milk being sold in Alexandria?"

It was reported that High's lowest price in the last few weeks was 8¢ per quart, and he sold 3.7% milk for 10¢.

Sales Area

Mr. Agnew: "What is the proposed sales area?"

Mr. Derrick: "Mr. Davis of Marcey Dairy had the map of the sales area, he has not come." However, Mr. Davis

came in about that time, and presented to the Commission and those present the outlined sales area. Mr. Walker reported that this was the proposed area for the federal license.

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Upon Mr. Marcey's arrival, Mr. Agnew explained the foregoing happenings of the meeting and asked Mr. Marcey his opinion of the milk regulations.

Mr. Marcey: "We go along with the Maryland and Virginia Milk Producers' Association. We buy all of our milk from the Association."

Mr. Agnew: "Are you able to adhere to set price or do you have to meet competition?"

Mr. Marcey: "We have to meet competition. Our lowest price is 10¢, we try, however, to maintain 13¢ per quart for 4% milk."

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Prices of Milk

Discussion of the milk prices to be set up followed. Mr. Davison reported that they paid the same price for milk as they did for cream (milk going into cream).

[fol. 38] Mr. Agnew asked if there were any objections to the price scale which had been submitted to the Commission. There were no objections, except from Mr. Hazel, who opposed generally.

Mr. Davison brought up the question of butterfat content of the proposed schedule, and stated that he believed that there should be a butterfat limit of 3.9-4.2% on one grade of milk.

Roundtable discussion pro and con the butterfat limit followed. Mr. Agnew cited Lynchburg as an example of having the high and low butterfat differential. He stated that milk testing higher is worth more, and this fact has proven to be profitable in the city of Lynchburg.

Mr. Hazel argued that the small distributor would be hurt in that he could not compete with the large distributors if he had to sell high test milk at a higher price.

Mr. Flagelson remarked that about 85% of the producers made milk testing from 3.5% to 4.0% butterfat.

Mr. F. Walker reported that the producers were putting Jersey and Guernsey cows into their herds to raise the butterfat test which had increased the test of milk received at the Association considerably.

Mr. Davison: "If I were a producer-distributor and wanted to beat this proposed order, I think I could very effectively go out and produce high test milk and sell it."

Mr. Agnew: "Do you think the differential should be 2¢ or 1¢?"

Mr. Burchell: "I think on quarts it should be 2¢ on anything over 4.2%.

There seemed to be a majority opinion among distributors that there should be a 2¢ differential between high and low test milk.

[fol. 39] Bottle Deposit

It was decided to postpone any provisions for a bottle deposit, as a bill was before legislature now which would make the bottle deposit useless. Judge Snow explained that the proposed bill would give police power in the state to prohibit anyone from using bottles which did not have his name on it.

Local Board Organization

Local board set up was explained by Mr. Agnew. He suggested that the distributors elect their representatives and the producers elect theirs, and each group submit about three names to the Commission for chairman of the local board in order of their preference.

In conclusion, Mr. Agnew stated that after the first of March the Commission would be glad to meet with any group who wished to make recommendations or suggestions relative to milk regulations, and would give them as much time as possible.

The meeting adjourned.

——— ———, Chairman. ——— ———, Secretary.

[fol. 40] EXHIBIT "C" TO COMPLAINT

COMMONWEALTH OF VIRGINIA:

State Milk Commission, Richmond

Rules and Regulations for the Supervision and Control of the Arlington-Alexandria Milk Market

Effective 12:01 a. m. April 1, 1936, and posted in the main office of the Commission and a certified copy filed in the office of the Commissioner of Agriculture in Richmond, Virginia.

Definitions

As used in the rules and regulations, unless otherwise stated, and unless the subject clearly indicates otherwise.

"Commission", "Distributor", "Producer", "Producer-distributor", "Consumer", "Licensee", "Milk", "Subsidiary", "Affiliate", "Boards", "Books", "Records", "Health Authorities", and "Sanitary Regulations", are clearly defined in the Milk and Cream Act, chapter 357, Acts of the Assembly, session 1934.

"Milk" means milk so designated by law, including ordinances applicable in the city of Alexandria.

"New Producer" means one who secures a permit from the Health Department, as required on this market, and has also secured permission from the Local Board to sell milk within the sales area after the efefective date of these regulations.

"Delivery Period" means the calendar month.

"Basic Allotment" means the established quantity of milk or base set up by the Local Board for each producer on an equitable basis with all other producers for apportioning Class I sales among the producers. The board shall determine the period for fixing allotments which will be based on quantities sold during any given period.

"Basic Quantity" means the quantity of milk or cream each producer receives in Class I as determined by dividing the total sales of Class I by the total allotments and then applying this percentage to each allotment.

"Arlington-Alexandria Sales Area" means the territory included within the following boundaries:

Beginning at the junction of the western boundary of the Arlington County line and the Potomac River, thence southwesterly along said county line to the corporate limits of Falls Church, continuing around the western boundary of the corporate limits of Falls Church to Highway 211. Thence northeasterly along Highway 211 to Highway 7. Thence southeasterly along Highway 7 to Highway 244. Thence southwesterly along 244 to Road 613. Thence [fol. 41] southeasterly and southwesterly along Road 613 to Road 644. Thence southwesterly along Road 644 to Road 635. Thence southeasterly along Road 635 to Road 611. Thence northeasterly along Road 611 to Road 633. Thence northeasterly along Road 633 to Road 628. Thence along Road 628 in a southerly and easterly direction to Road 626. Thence northeasterly along Road 626 to Road 629. Thence southerly along Road 629 to Road 626, thence easterly along Road 626 to Highway 235. Thence easterly in a straight line to the Potomac River. Thence northerly and westerly along the Virginia side of the Potomac River to the western boundary of the Arlington County line, the point of beginning.

"Arlington-Alexandria Production Area" means the territory included within the following boundaries:

Beginning at the junction of the Stafford and Prince William County line at the Potomac River. Thence northwesterly along said line to Highway 1. Thence southerly along Highway 1 to Highway 3. Thence westerly along Highway 3 to Highway 20. Thence westerly along Highway 20 to Highway 49. Thence southerly along Highway 49 to North Anna River. Thence westerly along said river to Highway 4. Thence northwesterly along Highway 4 to Highway 29. Thence northerly along Highway 29 to Highway 16. Thence northerly along said highway to Highway 211. Thence northeasterly along said highway to Highway 3. Thence northerly along said highway to county line of Warren and Rappahannock. Thence northeasterly along said line to the Warren and Fauquier County line. Thence in same direction to Clarke-Fauquier County line. Thence

in the same direction along said line to the Clarke-Loudoun County line. Thence northeasterly along said line to the intersection of the West Virginia and Virginia state line. Thence northerly along said state line to the Potomac River. Thence down the Potomac River to the junction of the Stafford and Prince William County line, the point of beginning.

Provided, however, that those farms outside such boundaries from which on the effective date of the regulations milk is marketed for distribution as fluid milk in the sales area shall not be excluded from the production area.

Regulation No. 1

Minimum Prices to be Paid Producers for Milk

A. Distributors shall pay producers, on or before the fifteenth day of each month following the close of each delivery period, the following prices for milk delivered in the Arlington-Alexandria Sales Area. All distributors shall pay the producers a differential, in addition to the schedule of prices set forth below for Class I Milk; they shall pay the producers an additional 6¢ per hundred pounds for each 1/10 of 1% above 4%, and shall deduct 6¢ per hundred pounds for each 1/10 of 1% below 4%.

[fol. 42]

Class I Milk	$3.08 per cwt. for 4% milk.
Class II Milk	The average price of 92 score butter in New York, for the current delivery period, as reported by the U. S. Dept. of Agri., multiplied by the per cent. of butterfat in the milk, plus 35¢ per cwt.

Class I Milk shall include all milk as follows:

(a) All milk for consumption or use sold by distributors in bulk or in bottles.

(b) All cream for consumption or use sold by distributors in bulk or in bottles.

(c) All cultured wholemilk for consumption or use sold by distributors in bulk or in bottles.

(d) All milk or cream used in chocolate milk.

(e) All milk or cream used in cottage cheese.

Class II Milk shall include all milk as follows:

(a) All milk used for manufacturing purposes.

B. The butterfat content of all milk delivered by each producer shall be determined by three or more tests made at approximately equal intervals during a delivery period. All testing for the butterfat content of milk and cream shall be made by the Babcock test and shall be subjected at all times to check tests made by a qualified representative of the Local Board.

C. A distributor shall not use in Class II, milk that can be used or disposed of in Class I. And no Class I or Class II milk can be purchased, brought in, or handled by distributors so long as local producers supply the demand for Classes I and II milk for this market.

Regulation No. 2

Confidential Report to the Milk Board Chairman

Each licensee in the Arlington-Alexandria Sales Area shall file with the chairman of the Arlington-Alexandria Milk Board on forms furnished by the board, on or before the tenth day of each month following the close of each delivery period, a report showing the following information for that period. This report shall be kept confidential and shall only be examined by the Local Board chairman or a person authorized by the chairman, and the Commission or its authorized employee:

[fol. 43] (a) The total weight of milk and/or cream received from each producer delivered to said distributor.

(b) The average butterfat test for each producer delivering milk and/or cream.

(c) The total weight and butterfat test of milk and/or cream purchased from other distributors.

(d) The total weight and average butterfat test that is sold in the following classifications: (1) Class I Milk (2) Class II Milk (3) Cultured wholemilk (4) Chocolate Milk (5) 18-22% cream and (6) 38-42% cream.

(e) Total weight and butterfat test of milk and/or cream sold to other distributors.

(f) The price per hundred paid for milk and/or cream from other distributors.

(g) The price per hundred received for milk and/or cream from other distributors.

Regulation No. 3

Farm Basic Allotments

A. Each distributor in the Arlington-Alexandria Sales Area shall file with the Local Board within ten days after being licensed to handle milk by the State Milk Commission, the basic allotment of each producer delivering milk to him. These allotments may be set up in their entirety or may be revised within the discretion of the Local Board. Basic allotments must be at all times set up and be on an equitable basis among all producers. The allotments of all producers shall be set up and made to include Class I Milk.

B. No distributor shall take on a new producer without the consent of the Local Milk Board.

C. Producers shall at all times deliver to their distributors all milk produced by them, except such milk as may be needed for home consumption, and no producer shall have a basic allotment in more than one market or with more than one distributor on that market.

D. A new producer shall receive for his total deliveries, during his first four full delivery periods, Class II price for his milk. After that time his basic allotment shall be set up by the Milk Board on a basis equitable with the other producers.

E. Any producer who fails to deliver his basic quantity during the months of October, November, and December, shall have his basic allotment lowered by the Milk Board. The Board, however, shall have the authority to waive this requirement for sufficient cause of an emergency character.

F. A renter or tenant who is a producer may retain his allotment in the event he moves from one farm to another, provided he is the owner of the entire herd.

G. Application for the transfer of basic allotments must be accompanied by evidence showing a bona fide sale of

the real estate which was used in the production of milk under the basic allotment in question.

[fol. 44] Regulation No. 4

Retail and Wholesale Selling Prices

The following schedule of minimum prices shall prevail in the Arlington-Alexandria Sales Area:

	Retail	Wholesale
(a) Milk 3.25-4.1% butterfat:		
Gallons—bulk	...	38¢
Quarts	13¢	11
Pints	7	6
Half-pints	5	3
(b) Milk 4.11-5.25% butterfat:		
Gallons—bulk	...	43¢
Quarts	15¢	13
Pints	8	7
Half-pints	5½	4
(c) Cultured Wholemilk:		
Gallons—bulk	...	38¢
Quarts	13¢	11
Pints	7	6
Half-pints	5	3
(d) Chocolate Milk:		
Gallons—bulk	...	38¢
Quarts	13¢	11
Pints	7	6
Half-pints	5	3
(e) Cream 18-22% butterfat (sweet or sour):		
Gallons—bulk	...	$1.50
Quarts	55¢	45
Pints	32	28
Half-pints	17	15
Gills	10	9
(f) Cream 38-42% butterfat (sweet or sour):		
Gallons—bulk	...	$2.75
Quarts	$1.10	85
Pints	60	50
Half-pints	34	30
Gills	20	18

[fol. 45] Regulation No. 5

Rules of Fair Practice

Each distributor in the Arlington-Alexandria Sales Area shall observe the following rules of fair practice:

A. The sale of articles under Regulation No. 4 shall be in containers or bottles of the size specified, and no milk and/or cream can be sold in excess of or below the butterfat content as is provided in paragraphs (a), (b), (e), and (f) of Regulation No. 4.

B. All prices listed in the retail price schedule shall apply on sales to consumers from wagons and stores.

C. The prices listed in the wholesale price schedule shall apply only on sales to hotels, restaurants, stores, hospitals, schools, licensed boarding houses, and other establishments having a merchant's license, where milk is resold for consumption whether on or off of the premises.

D. No distributor shall exchange new milk for milk previously sold or shall at any time take back milk from a store or any other place that buys milk for retail sale. All milk delivered by a distributor to a purchaser must be accounted for in the Class in which it is sold in the report of the distributor to the Local Board.

E. Nothing in this regulation shall be construed to prohibit a distributor from submitting bids asked for by any governing body of any municipality, county, state, or federal government, including relief agencies, charitable institutions, or any other agency entirely supported by the above mentioned governing bodies. Provided, however, that all such bids must reflect the cost plus a reasonable handling charge as set up under the regulations governing any particular sales area in which such institutions may be operating.

F. No distributor, his officer, employees, or agents, shall engage in any method or device whereby any article is sold or offered for sale at a price less than the price set up under Regulation 4, whether by discount, rebate, redeemable certificates, stamps, free service, merchandise, loans, installation of equipment, or combined price for such milk together with another commodity sold or offered for sale, credit

beyond the usual course of business, or any other valuable consideration.

Regulation No. 6

Assessments by the Milk Board

Each distributor shall pay to the Milk Board all assessments levied on him by the Milk Board, (except on that milk which has been purchased from licensed distributors), and shall deduct and pay to the Milk Board all assessments levied by the Board on each producer delivering milk to him. No assessment on producers shall exceed 2¢ per hundred pounds of milk, and no assessment on distributors shall exceed 2¢ per hundred pounds of milk. 1¢ per hundred pounds shall be levied and collected by the Milk Board on all milk received by a distributor and 1¢ per hundred on all milk sold or used by a distributor. Such assessment shall be collected on the fifteenth day of each month following the previous delivery period, and delivered to the secretary of the State Milk Commission for deposit to the account of the State of Virginia.

[fol. 46] In regard to milk sold by one distributor to another, commonly called "exchange milk", the first distributor shall be responsible for all assessments.

Regulation No. 7

As provided in Section 5, Acts of the Assembly, session 1934, Chapter 357; All distributors shall make application to the Milk Commission, for a license to operate as a distributor, by mail or otherwise within five days after the provisions of this Act become effective in a market. And as to any distributor thereafter beginning business, application shall be made to the Commission before engaging in such business.

State Milk Commission, J. S. Agnew, Chairman.

[fol. 47] In United States District Court

Motion for Temporary Restraining Order—Filed June 8, 1936

Come now the plaintiffs in the above entitled cause by leave of Court reserved them by the order entered herein on May 29, 1936, and upon their verified bill of complaint

heretofore duly filed herein and the affidavit and exhibits therewith and upon this petition and the affidavit and exhibits filed herewith, renew their motion pursuant to Section 380 United States Code Annotated (Judicial Code, Section 266, amended) for the issuance of temporary restraining order upon the grounds and in the manner set forth in said bill of complaint, to prevent immediate great and irreparable injury, loss and damage which would otherwise result to the plaintiffs before the hearing and determination of the application for an interlocutory injunction herein may be had or notice thereof be served, particularly because of the facts and circumstances set forth in said bill of complaint, and certain facts and circumstances which have occurred since the filing of said bill of complaint and which more fully appear in the affidavit which is filed herewith, to-wit:

1. That the rules and regulations for the supervision and control of the Arlington-Alexandria Milk Market, as made and adopted by the Milk Commission of the Commonwealth of Virginia, said rules and regulations being filed as an exhibit with the verified bill of complaint heretofore filed, became effective at 12:01 A. M., Monday, June 1, 1936.

2. That on June 1, 1936 the said Milk Commission demanded of the manager of one of the stores of the plaintiff, Luther W. High, at No. 1111 King Street, Alexandria, Virginia, that application be made to said Commission for a [fol. 48] distributor's license.

3. That on June 6, 1936, T. Justin Moore, Esquire, solicitor for the plaintiffs herein, received a letter from Edwin H. Gibson, Esquire, Assistant Attorney General of the Commonwealth of Virginia, with which was enclosed a copy of the bill of complaint and proposed decree to be presented in the Law and Equity Court, Part Two, of the City of Richmond, on Monday, June 8, 1936, at 2:30 P. M., copy of which bill and decree are attached to the affidavit filed herewith. That in said bill said Milk Commission seeks to enjoin the plaintiff, Luther W. High, or the managers of each of his four stores in the Arlington-Alexandria Milk Market area, from selling milk in said area at less than thirteen cents per quart retail, the minimum price fixed by said Milk Commission as provided in the rules and regulations of said Commission adopted for said area on March 27,

1936, and which became effective 12:01 A. M., Monday, June 1, 1936.

4. That the prices so fixed and sought to be enforced by the injunction proceedings aforesaid were fixed pursuant to a hearing held at the offices of the said Commission in the City of Richmond on February 20, 1936, at which said hearing there was no sufficient, adequate or bona fide public hearing and investigation held by said Commission to guide it in determining the reasonableness of prices and particularly the retail prices of milk, in that no inquiry was held as to the cost of production and distribution, including compliance with all sanitary regulations then and there in force, nor of necessary operation, processing, storage and delivery charges, the prices of other foods and the welfare of the general public. That the said hearing failed to comply with the provisions of Section 3, subdivision (i) of the Act of the General Assembly of Virginia of March 29, 1934, known as the "Milk and Cream Act", was insufficient and inadequate and in disregard of said provisions of said Act [fol. 49] in that the said Commission failed wholly to determine as a condition precedent to the fixing of minimum and maximum wholesale and retail prices to be charged for milk in Arlington-Alexandria Milk Market, and to the exercise of the other powers of said Commission in said market that the exercise of such powers would be to the public interest. That the insufficiency and inadequacy of said hearing and the failure of said Commission to comply with the provisions aforesaid in the conduct of said hearing appear fully from the minutes of said meeting of February 20, 1936, filed as an exhibit with the verified bill of complaint heretofore filed herein.

5. That the plaintiffs are now subject to the penal provisions provided for by said Milk and Cream Act in that the business of the plaintiff, Luther W. High, involved transactions daily at each of the said four stores by approximately eight employees and so long as said plaintiff shall not obtain a license and shall continue to sell milk at ten cents per quart retail in said area and to purchase milk in said area at eight cents per quart wholesale from the plaintiff corporation, as averred in the affidavit filed herewith, such transactions render said plaintiff and his employees liable to prosecution for each and every day's viola-

tion of the rules and regulations of said Commission and render them subject to a fine of not less than $25 nor more than $100, or to imprisonment for not less than thirty days nor more than one year, or to both fine and imprisonment for each and every such violation.

That, so long as plaintiff corporation sells milk to the plaintiff, Luther W. High, for sale within the Commonwealth of Virginia, at said prices, and without obtaining a license, said plaintiff corporation is so rendered liable to fines, and its officers, agents and employees to fines and imprisonment.

[fol. 50] Respectfully submitted, Highland Farms Dairy, Incorporated, Luther W. High, by (Sgd.) Hunton, Williams, Anderson, Gay & Moore, Philip Rosenfeld, Counsel.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILLING AMENDED BILL OF COMPLAINT, ETC.—Entered and Filed July 8, 1936

This day came the plaintiffs, by their solicitors, and moved this Court for leave to file their amended verified Bill of Complaint with exhibits thereto annexed, which, with the consent of the defendants, is accordingly this day filed by leave of Court.

It appearing from the verified amended Bill of Complaint and exhibits thereto annexed herein that this is a proceeding involving an application for a temporary restraining order and an interlocutory and permanent injunction enjoining and restraining the defendants, all of whom are officers of the Commonwealth of Virginia, from enforcing against the plaintiffs the provisions of Chapter 357 of the Acts of the General Assembly of Virginia, Session 1934, and the rules and regulations adopted by the defendants as the State Milk Commission and promulgated to become effective on June 1, 1936 in the Arlington-Alexandria Sales Area, upon the grounds, that the enforcement of provisions of said Act and rules and regulations will deprive the plaintiffs of their property without due process of law and deny

to the plaintiffs the equal protection of the laws in violation of their rights under the Fourteenth Amendment of the Constitution; and that the said Act and rules and regulations are in violation of the Fourteenth Amendment in that, neither under said Act nor under other statutory provisions [fol. 52] in Virginia, nor under said rules and regulations, is there adequate provision for a judicial review; and that said Act and the rules and regulations adopted pursuant thereto will constitute an interference with and a burden upon interstate commerce and thereby contravene the provisions of the Constitution of the United States Article I, Section 8; and that under Section 266 of the Judicial Code, as amended, (28 USCA Section 380) the hearing and determination of said application is directed to be had before a court consisting of three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, Now, Therefore, it is ordered that the following judges be called to my assistance to hear and determine said application, to-wit:

United States Circuit Judge Morris A. Soper, and United States District Judge Luther B. Way,

And it is further ordered that the application for said interlocutory injunction be, and it hereby is, set by consent of the parties for hearing on the 30th day of July, 1936, at 10 o'clock A. M., in the Court Room of the United States District Court at Alexandria;

It is further ordered that a copy of this order be served on the defendants, and that notice of the hearing as aforesaid be given respectively to the Governor and to the Attorney General of the Commonwealth of Virginia.

(Sgd.) Robert N. Pollard, United States District Judge.

July 8, 1936.

[fol. 53] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed July 22, 1936

It is hereby stipulated by and between the attorneys for the respective parties herein that there be submitted to the Court the application of the plaintiffs for an interlocutory and final injunction as prayed in their amended bill of

complaint and the answer and motion of the defendants to dismiss the bill. For the purposes of this submission the following facts are submitted with the intention that they have the same effect as though proven upon a trial and uncontradicted:

(1) The plaintiff, Highland Farms Dairy, Incorporated, is a domestic corporation of the Commonwealth of Virginia and a resident of the City of Washington, in the District of Columbia.

(2) The plaintiff, Luther W. High, is a citizen of the United States and a resident of the District of Columbia.

(3) The defendant, J. S. Agnew, is Chairman, and defendants, Kone Brugh and T. R. Snavely are members of the Milk Commission of the Commonwealth of Virginia and are residents of said Commonwealth.

(4) The amount in controversy in this suit exceeds the sum of Three Thousand Dollars ($3,000.) exclusive of interest and costs.

(5) The plaintiff, Highland Farms Dairy, Incorporated, is engaged and at all times hereinafter mentioned and since July 1, 1935, was continuously engaged in the business of operating a creamery for the pasteurizing and processing of milk at Washington, in the District of Columbia, and for such purpose purchases milk, chiefly in can lots, under direct contracts from farmers or producers in the District of Columbia, State of Maryland and the Commonwealth of Virginia for delivery of said milk to its creamery in the City of Washington. The transportation and delivery of said milk to the plaintiff in said City is performed by the farmers or [fol. 54] producers and at their cost. The said plaintiff corporation purchases approximately 575,228 pounds of milk monthly from the farmers or producers as aforesaid, and of said total amount of milk so purchased monthly, approximately 112,449 pounds, being 19½% of the total purchased, was purchased from farmers or producers who are in the Commonwealth of Virginia. Substantially all of the milk so purchased in the Commonwealth of Virginia has been, is and will continue to be produced in the Arlington-Alexandria Production Area, hereinafter referred to.

(6) In the routine procedure at the creamery of the plaintiff corporation, all milk is treated as a whole unit, without regard to the source of its supply, in that all milk, irrespective of from where it came, is poured into receiving tanks and from there pumped through a cooler into holding vats, and after pasteurizing and processing, is bottled; as a result thereof, milk received from farmers and producers, in the Commonwealth of Virginia, is commingled with milk received from farmers and producers in the District of Columbia and in the State of Maryland.

(7) The entire output of milk so bottled by the plaintiff corporation is sold to the plaintiff, Luther W. High, to be resold at retail by said plaintiff, Luther W. High, in the City of Washington, District of Columbia, State of Maryland, and in the Commonwealth of Virginia, as will more fully hereinafter appear; that because of the commingling of milk at said creamery, it is impossible for any person to determine what portion, if any, of the milk delivered to the plaintiff, Luther W. High, for retail sale in the Commonwealth of Virginia, was produced in or purchased by plaintiff corporation, in the Commonwealth of Virginia.

(8) The plaintiff corporation sells said milk to the plaintiff, Luther W. High, as aforesaid, in units and at wholesale prices, as follows:

[fol. 55]

Milk, 4% butterfat	8¢ per quart.
Cultured wholemilk	6¢ per quart.
Chocolate milk	4¢ per pint.
Cream 20% butterfat	20¢ per pint.
	11¢ per half pint.
Cream 40% butterfat	30¢ per pint.
	15¢ per half pint.

(9) The plaintiff Highland Farms Dairy, Incorporated, has obtained all licenses and permits required by the sanitary laws and regulations effective in the City of Washington, District of Columbia, the State of Maryland and the Commonwealth of Virginia, for the lawful conduct of its said business and it has duly kept, observed and performed all of the provisions of each of said sanitary laws and regulations of the Commonwealth of Virginia, for the lawful conduct of its said business.

(10) The plaintiff, Luther W. High, is engaged and at all times hereinafter mentioned has been engaged in the business of operating retail stores for the sale of ice cream, milk and certain other dairy products in and about the City of Washington, in the District of Columbia, the State of Maryland and the Commonwealth of Virginia, and in the course and conduct thereof engages in the business of handling and selling bottled milk in and about the Arlington-Alexandria sales area, as hereinafter referred to, in the Commonwealth of Virginia, and has invested in said business in Virginia a sum in excess of $30,000., of which sum an amount in excess of $4800. is invested in the places of business operated by the plaintiff, Luther W. High, in said Arlington-Alexandria Sales Area. The said plaintiff, Luther W. High, purchases in the District of Columbia, under contracts, all of the output of bottled milk of the said plaintiff, Highland Farms Dairy, Incorporated, The said plaintiff, Luther W. High, does not purchase from producers or distributors within the Commonwealth of Virginia any milk for resale, but purchases solely and entirely from the plaintiff corporation all of the bottled milk which is sold in his stores as aforesaid. The orders for the said bottled milk are telephoned daily and directly from the [fol. 56] several stores operated in the said Arlington-Alexandria Sales Area to the dairy of Highland Farms Dairy, Incorporated, in the City of Washington, District of Columbia, and such sales are made to the plaintiff, Luther W. High, in the City of Washington, and the delivery of said bottled milk to the said stores is made directly and in the trucks of Highland Farms Dairy, Incorporated.

(11) The plaintiff, Luther W. High, sells approximately 3,460 gallons of milk monthly in the Arlington-Alexandria Area in the Commonwealth of Virginia to the general public at retail in units and at prices, as follows:

Milk, 4% butterfat	10¢ per quart.
Cultured wholemilk	8¢ per quart.
Chocolate Milk	5¢ per pint.
Cream 20% butterfat	25¢ per pint.
	13¢ per half pint.
Cream 40% butterfat	35¢ per pint.
	18¢ per half pint.

The said plaintiff has built up a large and lucrative business in the retail sale of milk in bottles to consumers amounting in gross to over $20,000 annually by maintenance of the aforesaid units and prices. The said plaintiff, operating upon the familiar "cash and carry" plan, maintains its level of prices in the Arlington-Alexandria Area by the observance of the following practice:

No deliveries are made to purchasers outside of or away from the plaintiff's several stores; immediate payment is required from purchasers; and a deposit is required for the return of the bottle in which the purchased milk is contained.

A differential in the prices of the commodities and units sold by the plaintiff at retail and the prices for similar grade commodities and units sold by other distributors in said area who permit charge accounts and furnish delivery service is an essential factor in the plaintiffs' method of competition between the plaintiffs' business and the business of such other distributors.

[fol. 57] (12) The plaintiff, Luther W. High, has obtained all licenses and permits required by the sanitary laws and regulations effective in the Commonwealth of Virginia and each city or county therein wherein he conducts his business for the lawful conduct of his said business and he has kept, observed and performed all of the provisions of said sanitary laws and regulations.

(13) J. S. Agnew and Kone Brugh, members of the Commission, are, and have been for a number of years, producers of fluid milk, but neither of them sells his products in the Arlington-Alexandria milk market area, nor is either a member of the Maryland-Virginia Milk Producers' Association. T. R. Snavely, who is also a member of the Commission, is chairman of the Department of Economics of the University of Virginia, and is neither a producer nor a distributor of milk, but is a consumer and a customer of milk distributors.

(14) The enactment and language of Chapter 357 of the Acts of 1934 of the General Assembly of Virginia, filed as Exhibit A annexed to the plaintiffs' amended bill of complaint are stipulated. It is further stipulated that no legis-

lative investigation into the condition of the Milk Industry of Virginia was made or conducted by or at the instance of the General Assembly of Virginia as the basis for the enactment of the said chapter.

Previously, on February 19, 1934, a Bill (H. B. 335), providing for the supervision, regulation and control of the production, manufacture, transportation, storage, distribution and sale of milk and cream in Virginia, and the creation of a Milk Commission to administer said Act, substantially similar in purpose to Chapter 357 aforesaid, but differing materially therefrom with respect to the powers conferred on the Milk Commission and the manner of regulation provided for, was introduced in the House of Delegates of the General Assembly of Virginia, and on that day referred to the Committee on Agriculture and Mining. The [fol. 58] record of that Committee shows that the only action of that Committee was to pass by indefinitely this bill on February 25, 1934, thirteen of the seventeen members of the Committee being present. Said bill was reported out from said Committee on February 27, 1934, and, upon submission thereafter, to the vote of the House, was rejected on March 5, 1934.

The bill (House Bill No. 396) which was enacted as Chapter 357 of the Acts of 1934 was introduced in the House of Delegates, accompanied by a letter from the Governor of Virginia (a copy of which is attached hereto and filed herewith marked Exhibit 3), in the morning of March 10, 1934. Said bill was reported to the Committee on Agriculture and Mining, and said Committee immediately discharged from consideration thereof on that day. Printings and constitutional readings were waived and the bill adopted by the House and sent to the Senate on that morning. The Senate on the same day referred said bill to the Committee on Agriculture and Mining, immediately discharged said Committee from consideration thereof, dispensed with the constitutional readings, and enacted the same in the afternoon of March 10, 1934.

(15) That the meeting held by the State Milk Commission on Thursday, February 20, 1936, at 10 o'clock A. M., in the John Marshall Hotel, Richmond, Virginia, to consider the establishment of the milk market for the Arlington-Alexandria area, was advertised on February 6th and 13th, 1936,

in The Sun, a weekly newspaper published in East Falls Church, Virginia, and on February 6th, 12th and 17th, 1936, in the Alexandria Gazette, a newspaper published in Alexandria, Virginia, both newspapers having a general circulation in the territory embraced in the Arlington-Alexandria Milk Market Area; that knowledge of the meeting to be held was generally given to the producers, distributors and consumers in that area previous to the date of said meeting; that neither of the plaintiffs was present or represented at said meeting; that notice was given at the meeting, as stated in the minutes thereof (copy of which is filed with and annexed to the plaintiffs' amended bill of com- [fol. 59] plaint, marked Exhibit B), that the Commission would be glad to meet with any group who wished to make recommendations or suggestions relative to milk regulations and would give them as much time as possible; that one or more members of the Commission were present at the office of the Commission in the Capitol Building, Richmond, Virginia, for twenty-four days from March 3rd to March 28th, 1936, and that during the interval a number of interested persons appeared and verbally and voluntarily gave ex parte statements and statistics to the Commission relating to the subjects enumerated in paragraph (j), Section 3 of the Milk Act; among those appearing were M. A. Burchell, owner of the Alexandria Dairy Products Company, together with his auditor, who gave certain information covering the cost of distribution of fluid milk from his plant in the proposed Arlington-Alexandria Area; members of the Virginia-Maryland Producers' Association, who submitted a copy of an undated survey made by said Association for the Washington milk shed, copy of which is filed herewith and annexed hereto as Exhibit 4; and Mr. Davis, of the Arlington Dairy, Incorporated, who made certain verbal statements to the Commission as to the cost of distribution of milk by his corporation.

The copy of the minutes of the public hearing for the Arlington-Alexandria Milk Market held in the John Marshall Hotel, Richmond, Virginia, at 10 o'clock A. M., Thursday, February 20, 1936, filed with and annexed to the plaintiffs' amended bill of complaint, market Exhibit B, is stipulated and agreed to be a full, true and correct copy thereof. It is further stipulated and agreed that the letter dated February 19, 1936, addressed to the State Milk Commission

of Virginia by the Maryland-Virginia Milk Producers' Association, Inc., by Frank S. Walker, President, (copy of which is attached to this stipulation and filed herewith, market Exhibit 1), is a full, true and correct copy of the brief presented at the public hearing aforesaid on February 20, 1936, by Mr. Derrick referred to in the minutes aforesaid and recited as filed thereat.

[fol. 60] (16) That the Milk Commission established the Arlington-Alexandria Milk Market and rules and regulations therefor upon the basis of the information obtained by it at the public hearing of February 20, 1936, and also upon the basis of the information voluntarily furnished by interested persons as aforesaid between March 3rd and March 28, 1936, and of the following treatises which the Commission had in its files or received subsequent to the hearing of February 20, 1936, and which were not presented in evidence at said hearing:

"Virginia Farm Economics", a monthly publication of the Department of Economics of Rural Sociology, Virginia Polytechnic Institute, Blacksburg, Virginia; "The Dairy Herd Improvement Association", sponsored by the Virginia Polytechnic Institute, Dairy Extension Department, Blacksburg, Virginia; "Marketing Fluid Milk in Four Virginia Cities", a study of the marketing of milk in the Cities of Newport News, Petersburg, Lynchburg and Bristol, published in 1930 by the Virginia Agricultural Experiment Station, Blacksburg, Virginia; "An Economic Study of Dairy Farming in the Norfolk Milk Shed", a pamphlet published in February, 1935, by the Virginia Polytechnic Institute, Virginia Agricultural Experiment Station, Blacksburg, Virginia; "Prices and Consumption of Milk in Specific Cities as Related to Industrial Payroll and other Industrial Factors", published by the Agricultural Experiment Station, University of Illinois; "Cost of Producing Milk and Dairy Farm Organization in Spokane and Stephens Counties", published by Washington Agricultural Experiment Station, Pullman, Washington; "Farm Profits and Factors Influencing Farm Profits on Ninety-Eight Dairy Farms in Sussex County", published by New Jersey Agricultural Experiment Station, New Brunswick, New Jersey; "Report of Joint Legislative Committee to Investigate the Milk Industry in the State of New York", New York Legislative

Document (1933) 114; "Proceedings of the Middle States Conference of Milk Control", and "Determining a Fair Spread for Distributors."

[fol. 61] (17) The adoption and language of the "Rules and Regulations for the Supervision and Control of the Arlington-Alexandria Milk Market", adopted by the Milk Commission of the Commonwealth of Virginia on March 27, 1936, a full, true and correct copy of which is filed with and annexed to the plaintiffs' amended bill of complaint, marked Exhibit C, are stipulated.

(18) The plaintiffs had knowledge on or about April 1, 1936 of the establishment of the Arlington-Alexandria Milk Market and of the adoption by the defendants of the rules and regulations aforesaid.

(19) The plaintiff, Highland Farms Dairy, Incorporated, has continuously sold bottled milk to the plaintiff, Luther W. High, at prices lower than the minimum established by the rules and regulations adopted by the said Milk Commission for the Arlington-Alexandria Area and the plaintiff, Luther W. High, has continuously sold bottled milk to the general consumer public at prices lower than the minimum established as aforesaid.

(20) No statutory machinery or procedure for judicial review of the actions of the Milk Commission, either in the adoption of rules and regulations or in the granting, supervision, and revocation of licenses, is provided by the laws of Virginia other than in Chapter 357 of the Acts of 1934 of the General Assembly of Virginia. The Supreme Court of Appeals considered and decided questions involving the constitutionality of Chapter 357 of the Acts of 1934 in Reynolds v. Milk Commission, 163 Va. 957, 975, and sustained the constitutionality of said Chapter. The right is reserved to all parties to the present case to refer to the records and briefs in said case.

(21) The defendants in their official capacity have threatened to invoke against the plaintiff, Luther W. High, the remedies by injunction proceedings as provided by the sections of Chapter 357 of the Acts of 1934 of the General Assembly of Virginia, restraining the plaintiff from continuing his business as a milk dealer without first having

obtained the required license and from violating the rules and regulations of the said Commission as to retail sales prices.

[fol. 62] No action has been taken, and the Milk Commission and its counsel disclaim any intention of taking action of any character whatsoever against the Highland Farms Dairy, Incorporated, on account of the conduct of the corporation's business while it is being done as is alleged by that plaintiff in its bill of complaint.

(22) It is stipulated and agreed that the maps and schedules attached hereto filed with and made a part of this stipulation are a true and correct representation of the market areas and of the sale areas therein designated by the said Milk Commission and truly and correctly represented the dates upon which the said markets were designated and established in the Commonwealth of Virginia, since the enactment of Chapter 357 of the Acts of 1934 of the General Assembly of Virginia to the date of this stipulation. The Milk Commission has not established a market for the Richmond production or sales area. Federal authorities, acting under the Agricultural Adjustment Act, undertook to regulate prices by virtue of Federal statutes, now declared unconstitutional, but, a Federal Administrator has continued in the Richmond area, which includes the outlying territory in Chesterfield and Henrico Counties, to whom distributors handling approximately 85% of fluid milk continue to report. All distributors handling approximately 100% of fluid milk distributed in the Richmond area pay to producers for guernsey milk, 5% butterfat, $4.26 per hundred pounds; for all Grade AA milk, 4% butterfat, $3.37 per hundred pounds; for all Grade A milk, 4% butterfat, $2.895 per hundred pounds; that all distributors undertake to maintain a retail price of 15¢ per quart and 9¢ per pint for guernsey milk, of 13¢ per quart and 8¢ per pint for Grade AA milk, and of 12¢ per quart and 7¢ per pint for Grade A milk. Wholesale prices between distributors and the Richmond area are for guernsey milk 14¢ per quart and 8¢ per pint; for Grade AA milk 42¢ per gallon, 12¢ per quart, and 7¢ per pint; and for Grade A milk 39c per gallon, 12¢ per quart and 7¢ per pint.

[fol. 63] There is no established market in the Charlottesville area, but distributors are generally maintaining a re-

tail price of 13¢ per quart for Grade AA, 4% butterfat, fluid milk.

(23) Each party reserves the right to introduce and call for such oral evidence at the hearing as they may desire, subject to objection by the other party as to relevancy or materiality, with respect to the prices paid by the Maryland-Virginia Milk Producers Association, Incorporated, to producers for which said Association markets their milk, and with respect to the prices paid by Highland Farms Dairy to producers from whom said Dairy purchases its milk requirements, and with respect to the cost of operation of said Association and said Highland Farms Dairy.

(24) The foregoing stipulation of facts is intended to present as concisely as possible and in an orderly manner the facts stated in the amended bill of complaint and exhibits therewith filed, the two supporting affidavits verified on May 27, 1936, by Luther W. High, and on June 8, 1936, by Philip Roselfeld, respectively, and the verified joint and separate answer of the defendants, duly verified on the 16th day of June, 1936. Although this stipulation is intended to be complete in itself and not to need amplification from those sources, yet either party may refer to any of the aforesaid sources and each of said papers shall be considered by the Court and shall be given such weight as it is entitled to. Failure to copy into this stipulation any allegation of those sources is not intended to reflect upon their correctness and shall not support an inference that this stipulation is to be narrowly interpreted in any particular. The answer of defendants to the original bill of complaint shall be treated as defendants' answer to the amended bill of complaint.

No conclusions of law are admitted, and the Acts of the General Assembly of Virginia, as well as all adjudicated [fol. 64] cases, may be referred to and submitted for the consideration of the court.

(Sgd.) Hunton, Williams, Anderson, Gay & Moore, Philip Rosenfeld, Solicitors for Plaintiffs. (Sgd.) Edwin H. Gibson, Jno. S. Barbour, Solicitors for Defendants.

[fol. 65] Copy

EXHIBIT 1 TO STIPULATION

February 19, 1936.

State Milk Commission of Virginia, Richmond, Virginia.

GENTLEMEN:

We are making application to your honorable body for assistance in controlling prices to producers in the Alexandria-Fairfax areas. We find that prices ranging from 20¢ per gallon flat for 4% milk to 26½¢ flat and 26¢ plus premiums for Class I and 20¢ for Class 2 are frequent occurrences; all of these prices carry varying butter fat differentials. We also find that certain producer-distributors are selling their milk on the street at prices purported to be from 6¢ per quart to 11¢ per quart. Economic conditions would certainly justify a 13¢ retail price for milk on the streets in this territory when its respective food values and costs of other materials a housewife purchases are taken into consideration. Many articles have had a substantial increase in their sales price. To the present time there has been no increase in the retail price of milk over a period of the last three years and we are asking no increase at this time. However, we think it a distinctly unfair trade practice for individual producers to attempt to sell all of their milk in Class I uses and cut prices on the street to 6¢ and 8¢ per quart.

We therefore make an appeal to you to establish the following prices to producers in this territory:

Where milk is sold by the Maryland and Virginia Milk Producers' Ass'n or other producers to distributors we would ask that the prices be set at 26½¢ per gallon or $3.08 per cwt. for 4% milk, f. o. b. plant with a 6¢ per cwt. butterfat differential on or off from 4 per cent.

The Maryland & Virginia Milk Producers' Ass'n have the privilege as per its full supply contract with distributors to remove excess milk and sell it in manufacturing trade channels where the best possible price could be received. We ask for the privilege of continuing this practice.

Maryland & Virginia Milk Producers' Ass'n, Inc.,
Frank S. Walker, President.

(Here follows 1 photo, Exhibit No. 2 to Stipulation, side folio 66)

STIPULATION - EXHIBIT 2

Markets were created as follows:

(1)	June 15, 1934	Roanoke
(2)	July 1, 1934	Harrisonburg
(3)	July 1, 1934	Danville
(4)	July 22, 1934	Staunton - Waynesboro
(5)	July 26, 1934	Lynchburg
(6)	July 27, 1934	Petersburg- Hopewell
(7)	August 8, 1934	Newport News - Williamsburg
(8)	October 1, 1934	Norfolk - Portsmouth
(9)	June 16, 1935	Fredericksburg
(10)	June 16, 1935	Covington - Clifton Forge
(11)	July 1, 1935	Altavista
(12)	Sept. 9, 1935	Blackstone - Kenbridge - Victoria - Crew
(13)	January 1, 1936	Onancock
(14)	March 1, 1936	Bowling Green - Milford
(15)	April 1, 1936	Arlington - Alexandria
(16)	May 16, 1936	Suffolk

= Production Areas

= Sales Areas (Except where too small to be shown)

Construction and Detour Information

Volume 10 **July, 1936** **No. 7**

Indicates detour necessary.

Indicates work under way, traffic maintained, no detour.

Indicates soil road. Good condition except slippery if wet.

1. Routes 5 and 60 at east limits of Richmond; detour over alternate streets; marked. Route 360 at south limits of Richmond; railroad bridge and fill under construction on regular road; will be muddy and slippery on new fill in wet weather. Route 250 at west limits of Richmond; rebuilding old road one mile; traffic maintained over construction, or can use Three Chopt Road to Short Pump. Route 6 at west limits of Richmond; widening construction; drive carefully and watch for workmen and equipment on the road and barricades on edge of pavement.
2. Short run-around on Williamsburg Bypass where underpass is being built.
3. Bridge construction. Drive slow and watch for workmen and equipment on the road.
4. Bridge washed out. Road closed.
5. Construction on Route 111 on new location except connections of new and old roads. Traffic using regular gravel road.
6. Temporary trestle at railroad crossing in Strasburg. Expect to complete by July 15.
7. Construction on new location except crossings of new and old roads. These places will be rough or a little slippery if wet, but no trouble.
8. Bypass at Warrenton; construction on new location.
9. Construction Oak Grove to Lorty is along old road. Very dusty several miles if dry; muddy and slippery in places if wet. Expect to complete by August 1.
10. Traffic maintained over new soil and short section of surfacing. Good if dry, muddy in places and slippery if wet.
11. Traffic maintained over regular soil road and sections of construction; fair if dry; slippery if wet.
12. Traffic maintained over regular dirt road except where new and old roads cross. Rough but passable.
13. Route 234, Manassas 1½ miles south. Traffic over construction; rough but passable. Watch for workmen.
14. Bluefield 1.7 miles west; construction on new location; no interference. From 5 miles west to 10 miles west of Bluefield; construction beside old road in places; no trouble; slippery places on old pavement if wet.
15. Cumberland Gap to Kentucky Line; traffic maintained over new grade and section of surfacing in places. Expect to complete by July 20.
16. Short section of surfacing; very good condition.
17. Slippery if wet weather, very good if dry; rough short sections.
18. Traffic over construction one-half to one mile; muddy and slippery in wet weather; rough but passable if dry.
19. Construction on new location; none of old road will be torn up during July. Watch for workmen and equipment.
20. Surfacing only; short sections rough or slippery if wet. Drive carefully and watch for workmen on the road.
21. Traffic maintained over short section of construction; very good condition.
22. Street work in town, short section rough or use alternate streets; marked.
23. Traffic over sections of construction and old gravel road; very good if dry; muddy and slippery if wet.
24. Construction not interfering with traffic. Use regular graded road; slippery if wet.
25. Fort Chiswell, 1½ miles east, 300 feet one-way road. Expect to complete by July 15.
26. Wytheville, west. Traffic carried over ½ mile construction; fair condition. Expect to complete by July 20.
27. Between a point 8 miles west of Wytheville and Marion; traffic maintained over old macadam road and sections of construction. One 1,500-foot run-around rough in spots but passable. New grade is slippery in wet weather.
28. Traffic maintained over new graded road and stone surfacing. Very good if dry; muddy if wet.
30. Construction on new location except where new and old roads cross; fair condition in dry weather. Not advisable for through traffic.
31. Traffic maintained over several miles of new graded road and construction. Fair if dry, muddy and slippery if wet; men working in old road; through traffic advised to go by Christiansburg.
32. Concrete widening; present road not disturbed. Watch for workmen and equipment and stay on the pavement.
33. Traffic over short section of construction. Good in dry weather; slippery if wet.
34. Traffic over construction and old dirt road. Fair to good if dry; muddy and slippery if wet.
35. Construction between Elkton and Montevideo and between Montevideo and Harrisonburg along

Virginia Higher Institutions of Learning Accredited by State Board of Education - Richmond, Virginia

Standard Colleges

INSTITUTION	INDEX
Bridgewater College	J-3
Emory and Henry College	D-3
Hampden-Sydney College	K-4
Hollins College	G-4
Lynchburg College	*H-4
Mary Baldwin College	*J-3
Randolph-Macon College	L-3
Randolph-Macon Woman's College	*H-4
Roanoke College	G-4
Sweet Briar College	J-4
University of Richmond	L-4
University of Virginia	*E-3
Virginia Military Institute	*H-3
Virginia Polytechnic Institute	E-4
Virginia State College for Negroes	M-4
Virginia Union University (Colored)	*M-4
Washington and Lee University	*H-3
William and Mary College	*N-4

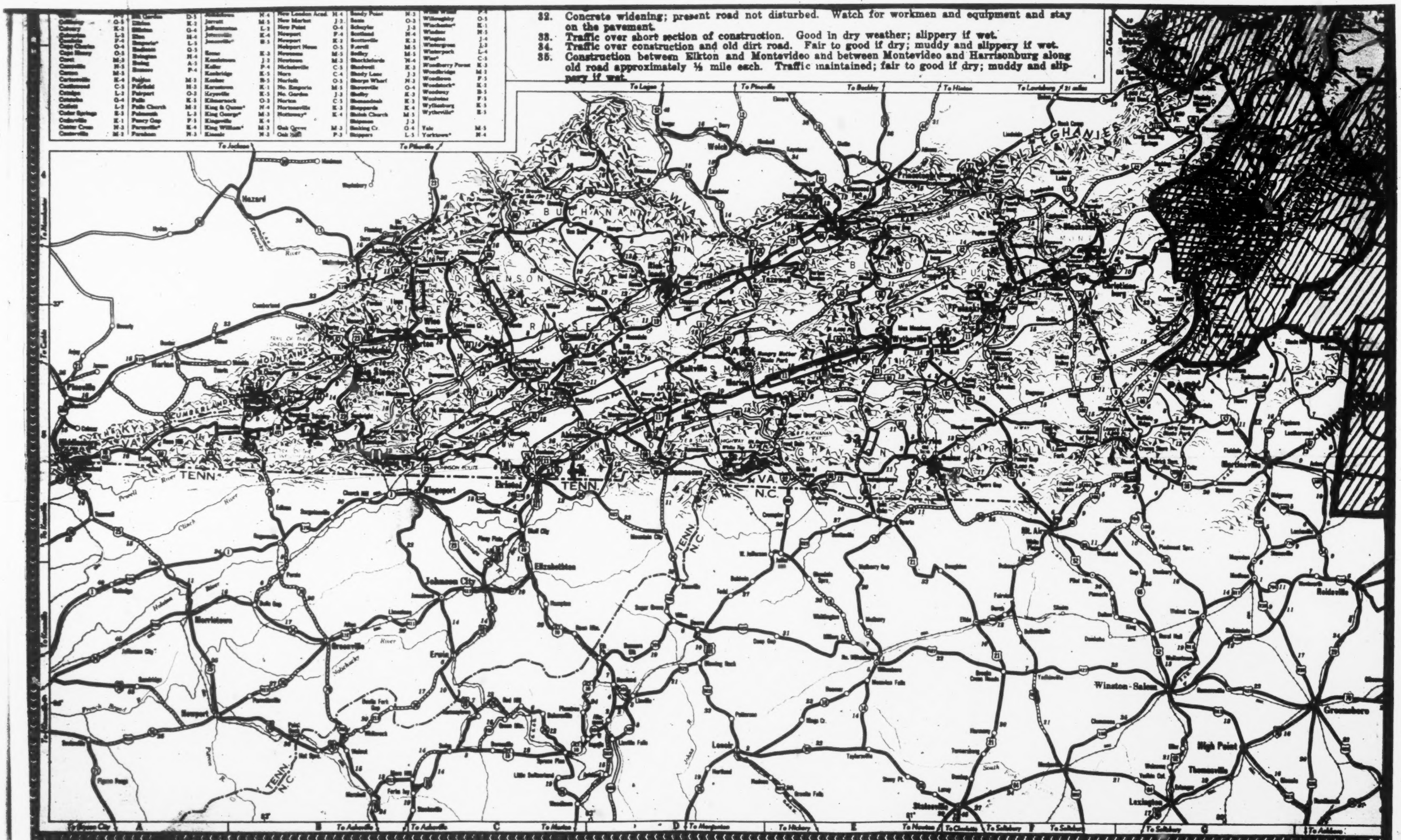
Standard Technical and Professional Colleges

Hampton Institute (Colored)	*O-3
Medical College of Virginia	*M-4
State Teachers College	K-4
State Teachers College	L-3
State Teachers College	*J-3
State Teachers College	K-4

* See City Map on back

To Elkton
To Charlottesville
To Lynchburg
To Farmville
To Petersburg
To Richmond
To Fredericksburg
To Washington
To Alexandria
To Manassas
To Culpeper
To Orange
To Gordonsville
To Louisa
To Staunton
To Harrisonburg
To Winchester
To Front Royal
To Strasburg
To Woodstock
To Edinburg
To Mount Jackson
To New Market
To Luray
To Shenandoah
To Stanley
To Sperryville
To Warrenton
To Culpeper
To Fredericksburg
To Washington
To Alexandria
To Manassas
To Leesburg
To Middleburg
To Upperville

32. Concrete widening; present road not disturbed. Watch for workmen and equipment and stay on the pavement.
33. Traffic over short section of construction. Good in dry weather; slippery if wet.
34. Traffic over construction and old dirt road. Fair to good if dry; muddy and slippery if wet.
35. Construction between Elkton and Montevideo and between Montevideo and Harrisonburg along old road approximately ½ mile each. Traffic maintained; fair to good if dry; muddy and slippery if wet.


To Logan
To Pineville
To Beckley
To Hinton
To Lewisburg 31 miles
To Jackson
To Pikeville
To Hazard
To Hindman
To Cadiz
Hazard
Hyden
Whitesburg
Cumberland
Harlan
Middlesboro
Pineville
Barbourville
London
Corbin
Somerset
Williamsburg
Jellico
Oneida
Huntsville
Kingsport
Bristol
Johnson City
Elizabethton
Erwin
Greeneville
Newport
Sevierville
Knoxville
Maryville
Alcoa
Cleveland
Athens
Chattanooga
Dalton
Rome
Summerville
Trion
Lafayette
Ringgold
Fort Oglethorpe
Chickamauga
Rossville
LaFayette
Trenton
Scottsboro
Guntersville
Albertville
Gadsden
Fort Payne
Boaz
Attalla
Rainsville
Sand Mountain
Lookout Mountain
Cumberland Mountains
Pine Mountain
Black Mountain
Big Stone Gap
Norton
Wise
Appalachia
Clintwood
Grundy
Richlands
Tazewell
Bluefield
Princeton
Welch
Williamson
Logan
Madison
Danville
Boone
Lenoir
Statesville
Mooresville
Salisbury
Concord
Kannapolis
Albemarle
Monroe
Charlotte
Gastonia
Shelby
Rutherfordton
Forest City
Spindale
Asheville
Hendersonville
Brevard
Waynesville
Sylva
Bryson City
Andrews
Murphy
Blue Ridge
Ellijay
Jasper
Canton
Cartersville
Rockmart
Cedartown
Rockingham
Laurinburg
Lumberton
Fayetteville
Sanford
Pittsboro
Siler City
Asheboro
Lexington
Thomasville
High Point
Winston-Salem
Greensboro
Reidsville
Eden
Martinsville
Danville
Chatham
Farmville
Appomattox
Lynchburg
Amherst
Buena Vista
Glasgow
Natural Bridge
Covington
Clifton Forge
Iron Gate
Low Moor
Hot Springs
Warm Springs
Monterey
Staunton
Waynesboro
Harrisonburg
Elkton
Grottoes
Luray
Front Royal
Winchester
Strasburg
Woodstock
Edinburg
Mount Jackson
New Market
Shenandoah
Luray
Page Valley
Stanley
Alma
Timberville
Broadway
Linville
Bridgewater
Dayton
Port Republic
Weyers Cave
Fishersville
Waynesboro
Crozet
Charlottesville
Scottsville
Lovingston
Amherst
Madison Heights
Lynchburg
Appomattox
Farmville
Pamplin City
Hopewell
Petersburg
Richmond
Fredericksburg
Culpeper
Warrenton
Manassas
Alexandria
Arlington
Washington
Leesburg
Purcellville
Middleburg
Upperville
Paris
Berryville
Boyce
Millwood
Clarke
Frederick
Hagerstown
Martinsburg
Shepherdstown
Charles Town
Harpers Ferry
Kearneysville
Ranson
Shepherdstown
Sharpsburg
Boonsboro
Keedysville
Williamsport
Hancock
Cumberland
Frostburg
Oakland
Grantsville
Deep Creek Lake
Accident
Mountain Lake Park
Oakland
Kingwood
Terra Alta
Rowlesburg
Parsons
Davis
Thomas
Elkins
Beverly
Buckhannon
Weston
Clarksburg
Fairmont
Morgantown
Grafton
Philippi
Barbour
Belington
Tygart Valley
Randolph
Pickens
Huttonsville
Mingo
Marlinton
Durbin
Cass
Green Bank
Hillsboro
Lewisburg
White Sulphur Springs
Ronceverte
Alderson
Hinton
Summers
Pipestem

COMMONWEALTH of VIRGINIA
STATE HIGHWAY SYSTEM
and CONNECTIONS

Legend

State Highways

- Hard Surface
- Gravel, Soil, Sand-Clay
- Unimproved
- Ferry
- Railroads
- State Highway Numbers
- Mileages Between Intersections
- Federal Highway Numbers
- National Battlefield & Park Areas

Secondary Roads

Hard Surface — Gravel, Soil, Sand-Clay — Unimproved

Approximate Population of Cities & Towns (1930)

- Over 100,000
- 50,000 to 100,000
- 25,000 to 50,000
- 10,000 to 25,000
- 5,000 to 10,000
- 2,500 to 5,000
- 1,000 to 2,500
- Under 1,000

Over 25,000 in Virginia only, for Population see Back of Map

STATE PARKS

Scale of Miles 0 5 10 20 30 40

AIRPORTS

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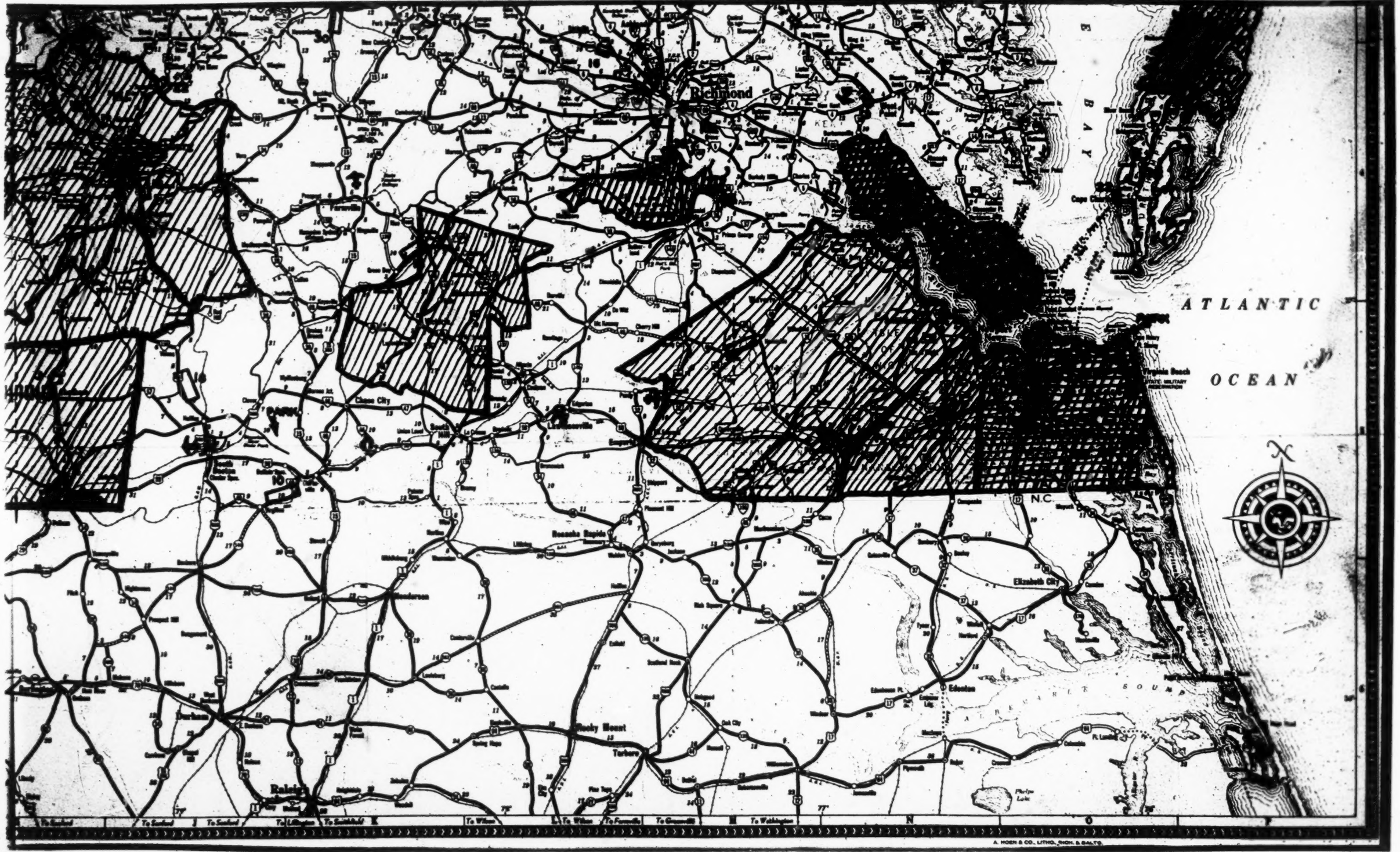
COMMONWEALTH of VIRGINIA STATE HIGHWAY COMMISSION

JULY 1936

Base Map made by General Drafting Co., Inc., New York

Hartlesburg
Frederick
Brunswick
Wincheste
Washington
To Annapolis
To Salisbury
To Salisbury
CHESAPEAKE


Richmond
ATLANTIC
OCEAN
N.C.
Elizabeth City
Edenton
Rocky Mount
Tarboro
Raleigh
Chase City
Roanoke Rapids
Virginia Beach
To Suffolk
To Suffolk
To Suffolk
To Wilson
To Wilson
To Greenville
To Washington
A. HOEN & CO., LITHO., RICH. & BALTO.

[fol. 67] EXHIBIT 3 TO STIPULATION

Richmond, March 10, 1934.

To the General Assembly of Virginia:

In an attempt to meet the emergency which now exists in the production and distribution of milk and cream for fluid consumption there has been prepared a bill entitled "A bill to provide for the supervision, regulation and control of the production, processing, transportation, storage, distribution and sale of milk and cream; to create a milk commission and local milk boards and to define and provide for the function, duties and powers thereof; to provide for the appointment, suspension, removal, compensation, costs, and expenses of such commission and boards and members, officers, agents and employees thereof; to provide for licensing processors, bottlers, wholesalers, distributors and retailers of milk and cream, or either; to provide for the raising of funds for the administration of this act and to provide for the disposition of revenue collected hereunder; and to impose penalties for violation of the provisions of this act," which bill I request that you permit to be introduced and considered during your present session.

I understand that similar legislation has been passed in the States of Connecticut, Florida, New Jersey, Ohio, Oregon and Vermont, and that this bill is also similar to the New York Statute, the constitutionality of which has recently been upheld by the Supreme Court of the United States.

George C. Peery, Governor.

[fol. 68] EXHIBIT 4 TO STIPULATION

Milk Production Cost Survey

	Cost	Cents per Gallon	Per Cent
Feeds	$770,387.19	12.32¢	40.91%
Labor	348,290.48	5.57	18.50
Transportation	189,645.84	3.03	10.07
Power, Ice, Boiler	77,310.47	1.24	4.11
Supplies, Painting, etc.	33,038.01	.53	1.76
Veterinary Service	11,409.56	.18	.61
Herd Improvement Association	6,617.96	.11	.35
Taxes	16,401.11	.26	.87
Insurance	15,213.71	.24	.81
Brokerage	60,569.96	.97	3.22
Interest on Investment in Cows	42,033.20	.67	2.23
Depreciation on Cows	105,084.00	1.68	5.58
Interest on Investment (Buildings, Land, and Equipment)	111,527.56	1.79	5.93
Depreciation on Buildings, Equipment	95,699.70	1.52	5.05
Totals	$1,883,223.75	30.11¢	100.00%

Number of Shippers—302.
Number of Cows—8,757.

Md. & Va. Milk Producers' Ass'n., Inc., 1731 Eye Street, N. W., Washington, D. C.

[fol. 69] Explanation of Method Used in Determining the Production Cost of Milk Per Gallon

The attached form was mailed to entire membership (1167). 433 were returned of which 302 were used in computing the cost. Those not used were either not fully or properly filled out. The average production cost was found to be 30.11¢ per gallon for 4% milk. In determining this cost the following method was used:

6% interest on investment.
3% depreciation on buildings.

20% depreciation on equipment (cans, storage tanks, sterilizers, buckets, etc.).

The tax rate was applied against 50% of value given by the producer, as it was found the assessed value was usually about 50% of the total value.

By land is meant the land occupied by stable yard and dairy buildings including fenced off area around the buildings.

An average cow value of $80 was used and the average cow life was figured at five years. At the end of the five years milking period she was valued at $20 leaving $60 to be divided by the five years in determining depreciation. Therefore, $12 per cow was allowed for depreciation in calculating the cost per year.

In determining total production an average per production per cow of 1.971 gallons of 3.971% butterfat was computed by dividing the total production on the market August 1, 1932 to August 1, 1933 plus two gallons per day per shipper (this represents milk used for home use) by the number of cows recorded at the Health Department January 1, 1933.

The average production per cow of 1.971 gallons testing 3.971% is equivalent to 1.9567 gallons per day of 4% milk which was used in indicating total production. The actual amount shipped was 1.895 gallons of 3.971%.

The average percentage of butterfat of 3.971 was determined by taking the twelve months period from August 1, 1932 to August 1, 1933 and calculating the weighted average butterfat content of the milk shipped by 10% of the shippers. This was done by taking every tenth man on the brokerage statements.

The average number of cows per shipper of those returning forms which were used was found to be 29.

[fol. 70] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PHILIP ROSENFELD—Filed June 8, 1936

UNITED STATES OF AMERICA,
Commonwealth of Virginia,
City of Richmond, ss:

Philip Rosenfeld, being duly sworn, on oath deposes and says:

I am an attorney, and counsellor at law, and one of the solicitors for the plaintiffs herein, and have personal knowledge of the matters hereinafter stated, in relation to the above captioned proceedings.

1. Rules and regulations for the supervision and control of the Arlington-Alexandria Milk Market, as made and adopted by the Milk Commission of the Commonwealth of Virginia on March 27, 1936, became effective 12:01 A. M., Monday, June 1, 1936.

2. On June 2, 1936, the plaintiff, Luther W. High, received a letter dated June 1, 1936, from said Milk Commission, addressed to Mrs. C. Powell, as the manager of one of his stores at No. 1111 King Street, Alexandria, Virginia. Enclosed therein was a copy of said rules and regulations and an application blank for a distributor's license; said application blank is hereto attached. Plaintiff was further advised therein that it was "very necessary that you submit this application immediately". No application by either plaintiff herein has been made.

3. On June 6, 1936, T. Justin Moore, Esquire, solicitor for the plaintiffs herein, received a letter from Edwin H. Gibson, Esquire, Assistant Attorney General of the Commonwealth of Virginia, in which was enclosed a copy of a bill of complaint and proposed decree, to be presented in [fol. 71] the Law and Equity Court, Part Two, of the City of Richmond, on Monday, June 8, 1936, at 2:30 P. M. A copy of said bill and decree are hereto attached. In said bill, said Milk Commission seeks to enjoin plaintiff, Luther W. High, and the managers of each of his four stores in the Arlington-Alexandria Milk Market area from selling milk in said area at less than thirteen cents per quart retail, the minimum price fixed by said Milk Commission, as provided in said rules and regulations, notwithstanding that there has been

no sufficient, adequate or bona fide public hearing and investigation held by said Commission to guide said Commission in determining the reasonableness of prices, in that no inquiry was had as to the cost of production and distribution, including compliance with all sanitary regulations then and there in force, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public.

Plaintiff, Luther W. High, purchases milk exclusively from the plaintiff corporation, in interstate commerce, at Washington, D. C., at the price of eight cents per quart, and said milk, resold in the milk market area, as aforesaid, for ten cents per quart retail, is of like high grade and quality as is sold by other dealers and competitors, and as prescribed in said rules and regulations, for said milk market area.

4. The plaintiffs are now subject to the penal provisions as provided in the Milk and Cream Act, (Chapter 357, 1934 Session) in that the business methods of plaintiff, Luther W. High, involve transactions daily at each of the said four stores, by approximately eight employees, and so long as said plaintiff shall not obtain a license and shall continue to sell milk at ten cents per quart retail in said area, and to purchase milk for resale in said area at eight cents per quart, wholesale, from the plaintiff corporation, such transactions render said plaintiff and his employees liable to [fol. 72] fines and imprisonment.

Further, so long as plaintiff corporation sells milk to the plaintiff, Luther W. High, for sale within the Commonwealth of Virginia, at such prices, and without obtaining a license, said plaintiff corporation is so rendered liable to fines, and its officers, agents and employees to fines and imprisonment.

Further deponent saith not.

(Sgd.) Philip Rosenfeld.

Subscribed and sworn to before me this 8th day of June, 1936. (Sgd.) G. A. Miller, Notary Public. (Notarial Seal.)

[fol. 73] APPLICATION FOR DISTRIBUTOR'S LICENSE

——, Virginia,
—— —, 193-.

To the Milk Commission of Virginia:

_____, a corporation chartered under
Name of applicant (s)

the laws of —— (or an individual or individuals) trading as ——, hereby make (s) application, pursuant to the provisions of Chapter 357, Acts of the General Assembly of 1934 for a license to operate as a distributor, as provided in and in accordance with the provisions of the said Act in the —— market. The applicant (s), if an individual or individuals, certify that he (they) paid the State Capitation tax assessed or assessable against him (them) for the year 1935.

The name- and addresses of the officers and directors or other governing body of the applicant are as follows:

_____ _____

_____ _____

_____ _____

_____
Signature (s) applicant (s)

_____
President.

_____
Secretary.

Approved:

_____
Chairman.

[fol. 74]

_____
Address of applicant (s)

_____
City. County.

[fol. 75] VIRGINIA:

IN THE LAW AND EQUITY COURT, PART TWO, OF THE CITY OF RICHMOND

STATE MILK COMMISSION

v.

LUTHER W. HIGH, Trading as High's; K. A. WEBB, (MRS.) E. HOLLIDAY, (MRS.) L. HENDERSON and (MRS.) C. POWELL

BILL

To the Honorable Frank T. Sutton, Jr., Judge:

Your complainant, State Milk Commission (created by the provisions of chapter 357 of the Acts of the General Assembly of 1934, page 558), humbly complaining, showeth unto Your Honor the following case:

1. That said Act gives full authority to complainant in subsection (c) of section 3 "To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia", and in subsection (g) of section 3 "To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the purposes of this act."

That complainant may, as provided in subsection (m) of section 3, "define what shall constitute a natural market area and define and fix the limits of the milkshed or territorial area within which milk shall be produced to supply any such market area; * * *."

Subsection (k) of section 3 provides:

The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. * * * The commission may classify licenses, and may issue licenses to distributors to process or store [fol. 76] or sell milk to a particular city or village or to a particular market or markets within the Commonwealth."

2. Pursuant to the authority vested in the Milk Commission by the General Assembly of Virginia, the Commission, after having given reasonable public notice of the time,

place and purpose of said meetings, held public meetings in its office in the State Capitol Building, Richmond, Virginia, on February 20, 1936, at which public hearings and investigation, and upon evidence then and theretofore taken and investigations theretofore made covering the costs of production and the fair and reasonable, minimum prices payable to producers and like wholesale and retail prices chargeable by distributors, and all interested parties appearing having been heard as to the advisability and necessity of establishing a market for the county of Arlington and the city of Alexandria and of fixing the prices to be paid producers and/or associations of producers or distributors in said market, and the maximum and minimum wholesale and retail prices to be paid and charged for milk in said market, the Commission adopted rules and regulations for the supervision and control of the Arlington-Alexandria milk market, effective 12:01 a. m. Wednesday, April 1, 1936.

On account of the institution of injunction proceedings in the Circuit Court of Fairfax county, the operation of the rules and regulations established for the said Arlington-Alexandria milk market area was temporarily enjoined and restrained, and only became actually effective at 12:01 a. m. Monday, June 1, 1936.

3. Complainant alleges and charges that the defendant, Luther W. High (a non-resident of the State of Virginia), trading as High's, is the owner and operator of four places of business within the Arlington-Alexandria milk market area, in which places of business fluid milk is sold for human consumption; that of the four places of business so owned [fol. 77] and conducted by the said Luther W. High in the said Arlington-Alexandria milk market area, one is located at 1111 King Street in the city of Alexandria, Virginia, of which (Mrs.) C. Powell is manager for said Luther W. High; that another is located at 1207 Mount Vernon Avenue in the city of Alexandria, Virginia, of which (Mrs.) L. Henderson is manager for said Luther W. High; that another is located at 726 King Street in the city of Alexandria, Virginia, of which (Mrs.) E. Holliday is manager for said Luther W. High; and that another is located at 3207 Washington Boulevard in Clarendon, Virginia, of which K. A. Webb is the manager for the said Luther W. High.

Complainant further alleges and charges that the said

Luther W. High, trading as High's, and his employees, the said K. A. Webb, (Mrs.) E. Holliday, (Mrs.) L. Henderson and (Mrs.) C. Powell, managers of the said four places of business so owned and operated by the said Luther W. High in the said Arlington-Alexandria milk market area, have failed and refused to comply with Regulation No. 4 of the rules and regulations adopted by the complainant, the State Milk Commission, regulating and fixing the retail prices of milk sold by them, respectively, in each of the aforesaid places of business in which each is manager, and are continuing to sell milk at retail, for human consumption, at prices below those ascertained, fixed and established for the Arlington-Alexandria milk market area.

The said Luther W. High, trading as High's, and his employees, the said K. A. Webb, (Mrs.) E. Holliday, (Mrs.) L. Henderson and (Mrs.) C. Powell, managers of the said four places of business so owned and operated by the said Luther W. High in the said Arlington-Alexandria milk market area, on June 1, 1936, and at various other times since that date, have sold milk, containing 3.25-4.1% butterfat, in quantities of one quart at and for the price of ten cents per quart, whereas the retail price per quart, chargeable by dis- [fol. 78] tributors to customers for such milk, was fixed by Regulation No. 4, subsection (a) at thirteen cents per quart retail.

For as much, therefore, as the Commission may, without regard to other remedies, apply to Your Honor's court of equity for relief by way of injunction, it prays that Luther W. High, trading as High's; K. A. Webb, (Mrs.) E. Holliday, (Mrs.) L. Henderson and (Mrs.) C. Powell may be made parties defendant to this bill and required to answer the same, answer under oath being waived; that the said defendants, and each of them, may be enjoined and restrained from selling milk, containing 3.25-4.1% butterfat, at less than thirteen cents per quart retail, in the said Arlington-Alexandria milk market area, as provided in Regulation No. 4, subsection (a), of the rules and regulations adopted by the State Milk Commission for the supervision and control of the Arlington-Alexandria milk market; that all orders and decrees may be entered and proceedings had in this case, and that your complainant may have such other

and further relief as to equity may seem meet and its cause require.

State Milk Commission, by Counsel. —— ——, Attorney General. —— ——, Assistant Attorney General.

[fol. 79] VIRGINIA:

IN THE LAW AND EQUITY COURT, PART TWO, OF THE CITY OF RICHMOND

STATE MILK COMMISSION

v.

LUTHER W. HIGH, Trading as High's; K. A. WEBB, (Mrs.) E. HOLLIDAY, (Mrs.) L. HENDERSON and (Mrs.) C. POWELL

DECREE

This day came the plaintiff, by the Attorney General of Virginia, and presented its bill duly verified by affidavit, and, by leave of court, filed its bill of complaint; whereupon, in accordance with the prayer of the bill, an injunction is awarded the plaintiff, enjoining and restraining the defendants, their agents, servants and employees, from selling milk, containing 3.25-4.1% butterfat, or a higher percentage of butterfat, at less than thirteen cents per quart retail at the places of business of the said Luther W. High within the Arlington-Alexandria milk market area, as provided in Regulation No. 4, subsection (a), of the rules and regulations adopted by the State Milk Commission for the supervision and control of the Arlington-Alexandria milk market.

This injunction, unless sooner enlarged or dissolved, shall remain in force until —— —, ——. The plaintiff being a public governmental agency, no bond is required of it.

[fol. 80] IN UNITED STATES DISTRICT COURT

JOINT AND SEPARATE ANSWER OF J. S. AGNEW, CHAIRMAN, AND KONE BRUGH AND T. R. SNAVELY, MEMBERS OF MILK COMMISSION—Filed June 16, 1936

The defendants, for answer to said bill, or to so much thereof as they are advised it is material for them to answer, answering say:

1. Defendants admit as true all the allegations contained in paragraphs 1, 2, 6, 8, 9, 10, 12, 13, 14, 15 and 16 of the said bill of complaint.

2. Defendants deny the allegations contained in paragraph 3 of the said bill, if the purpose of those allegations is to confer jurisdiction in this court because of diverse citizenship. For further answer to said paragraph, defendants say that the plaintiff, Highland Farms Dairy, Incorporated, is a corporation chartered under the laws of the State of Virginia, with its principal office at Alexandria, Virginia, and that it has appointed Gardner L. Boothe, of the city of Alexandria, Virginia, as its statutory agent. It is, therefore, of the same citizenship as all the defendants. While it is admitted that Luther W. High is a citizen of the United States and of the District of Columbia, all his business, which is the subject of this litigation, is done within the State of Virginia.

3. Defendants neither deny or admit the allegations contained in paragraph 4 of the said bill and, so far as any matter alleged in said paragraph is pertinent to any inquiry necessary to a decision of these proceedings, call for strict proof of same.

4. Defendants are not advised as to the truth of the allegations contained in paragraphs 5 and 7 of said bill, in par- [fol. 81] agraph 5 of which the plaintiff, Highland Farms Dairy, Incorporated, alleges that it has obtained all necessary licenses and permits as are required by the sanitary laws and regulations of the city of Washington, District of Columbia, the State of Maryland and the Commonwealth of Virginia, and in paragraph 7 of which the plaintiff, Luther W. High, alleges that he has obtained all licenses and permits as are required by the sanitary laws and regulations of the Commonwealth of Virginia, and of each city and county therein wherein he conducts his business, for the lawful conduct of his said business. Defendants deny that, so far as the proceedings in this case are concerned, the question of such licenses and permits is in issue.

Defendants deny that either the Highland Farms Dairy, Incorporated, or Luther W. High, has obtained from the State Milk Commission of Virginia, the licenses required of each under the provisions of section 5 of chapter 357 of the Acts of 1934.

5. As to paragraph 11 of the said bill, in which it is alleged that each of the plaintiffs is a distributor within the meaning of the provisions of section 1 of chapter 357 of the Acts of 1934 (commonly called and referred to as the Milk Act), defendants deny that the Highland Farms Dairy, Incorporated, is a distributor under the provisions of the Milk Act construed with reference to the sworn allegations of that corporation contained in said bill. Defendants admit the allegation of the plaintiff, Luther W. High, that he is a distributor within the meaning of the provisions of section 1, subsection (c), of the Milk Act. With reference to the plaintiff, Luther W. High, defendants admit that he is a distributor doing business as High's in establishments conducted by him in the Arlington-Alexandria milk market area under the provisions of subsection (c) of section 1 of the Milk Act.

[fol. 82] 6. Defendants admit the allegation contained in paragraph 17 of the said bill, to the effect that a public hearing upon the establishment of a milk market for the Arlington-Alexandria area was called upon a petition submitted to the Commission by the Virginia and Maryland Milk Producers' Association, and that said hearing was held on February 20, 1936. Defendants also admit that the Commission did not undertake to establish rules and regulations effective for the Arlington-Alexandria milk market until April 1, 1936, and that "Exhibit C" filed with said bill is a copy of the rules and regulations fixed by the Commission for said market.

Defendants deny that the said hearing was insufficiently and arbitrarily conducted, and that no investigation was made, or sought to be made, as provided in subsection (j) of section 3 of the Milk Act; and they especially deny the allegation that they did not take evidence or make any effort to investigate, and failed and omitted to inquire into the reasonableness of prices to be paid or charged in the said market, and failed and omitted to inquire into the cost of production and distribution, including compliance with all sanitary regulations in force in said market, the necessary operation, processing, storage and delivery charges, the price of other foods, and the welfare of the general public, as required by the said Act.

Defendants admit that they adopted rules and regulations for the supervision and control of the Arlington-

Alexandria milk market, effective April 1, 1936, on March 27, 1936. They also admit that, because of injunction proceedings had and held in the Circuit Court of Fairfax county, Virginia, the effective date of the rules and regulations was postponed until June 1, 1936, as alleged in paragraph 18 of said bill.

7. Defendants deny the allegation contained in paragraph 18 of said bill that they proceeded, without further investigation, to adopt and promulgate the said rules and regula- [fol. 83] tions, covering the minimum prices to be paid by milk distributors to producers and the minimum wholesale and retail prices to be charged by distributors, were arbitrarily and capriciously fixed and established.

8. As to the establishment of the Arlington-Alexandria milk market and the investigation required by subsection (j) of section 3 of the Milk Act, defendants show unto the court that a legal notice of the hearing set for February 20, 1936, at 10:00 o'clock a. m., in the John Marshall Hotel, Richmond, Virginia, "to ascertain if it will be to the public interest for the Milk Commission to exercise the power confered under Chapter 357 of the Acts of the General Assembly of 1934 in the Arlington-Alexandria area", was published on February 6 and 13, 1936, in The Sun, a weekly newspaper published in East Falls Church, Virginia, and having a general circulation in the territory embraced, or to be embraced, in the Arlington-Alexandria milk market area, a copy of said legal notice so published being herewith filed as "Exhibit Y" and asked to be read as a part of this answer. A legal notice to the same effect was published on February 6, 12 and 17, 1936, in the Alexandria Gazette, a newspaper published in Alexandria, Virginia, and having a general circulation in the territory embraced, or to be embraced, in the Arlington-Alexandria milk market area. In addition to the legal notices given the general public as detailed, the Commission, from its headquarters in Richmond, Virginia, mailed notices to all known distributors prior to the public hearing on February 11, 1936.

A reference to the minutes and proceedings of said public hearing in the John Marshall Hotel, Richmond, Virginia, having already been made a part of the said bill and marked "Exhibit B", defendants refer to the fact that there was an attendance of twenty, comprising representatives of the

Virginia-Maryland Milk Producers' Association, a number of distributors, two from the city of Washington and one [fol. 84] from Alexandria, Virginia, accompanied by his attorney; the auditor of the Alexandria Dairy, two representatives of the Arlington County Dairies, Clarendon, Virginia; W. A. Hazel, of Falls Church, Virginia; Sam Fagelson, a producers of Alexandria, Virginia; a merchant of Alexandria, Virginia, and a milk hauler of Alexandria, Virginia. At said public hearing a schedule of prices was submitted by the secretary of the Virginia-Maryland Milk Producers' Association, and a sketch or plan of the tentative production area. Questions as to whether there were any objections to the production area were asked, to which there was no response. Except for the remarks advanced by counsel for the Alexandria Dairy Products Company as to the practicability of a market, no objection was made to the proposed area, nor to the prices suggested, with the exception of Mr. Hazel, representing Hazel's Dairy of Falls Church, Virginia, who opposed any regulation, suggested, no price and, at his request, went on record as "absolutely opposed to any form of regulation." As will be seen by reference to page 6 of "Exhibit B" filed with said bill of complaint, under the title "Prices of Milk", there was a discussion of the milk prices to be adopted, and, upon call for objections to the price scale which had been submitted to the Commission, there was none except from Mr. Hazel, "who opposed generally." Before the adjournment of the meeting, the chairman of the Commission stated that "after the first of March the Commission would be glad to meet with any group who wished to make recommendations or suggestions relative to milk regulations, and would give them as much time as possible."

And again, referring to the minutes of said meeting of February 20, 1936, it will be seen that Judge W. S. Snow, of Alexandria, Virginia, representing Mr. Burchell of the Alexandria Dairy Products Company, had already been in conference with Edwin H. Gibson, Assistant Attorney General and counsel for the State Milk Commission, who had [fol. 85] assured Judge Snow that the Commission had no authority to regulate interstate milk. As a matter of fact, Judge Snow had been informed by Major Gibson that the State Milk Commission did not intend to attempt to control or regulate the interstate milk business of any person en-

gaged in that business in the proposed Arlington-Alexandria milk market area. The defendants, as a Commission and individually, discussed with their counsel the legal principles applicable to interstate commerce as partially limiting their effective control of the proposed market, and had been fully advised of the interstate commerce law, and, as will be seen by the regulations already in evidence as a part of the said bill, made no effort to control interstate commerce; and, as has already been done before Your Honor by defendants' counsel, as will be seen by a reference to the order entered in this case on May 29, 1936, counsel expressly disclaimed any intention of interfering with interstate commerce, and the defendants now, individually and as a Commission, disclaim any intention of interfering with such commerce.

Before going into detail as to the manner of their compliance with section 5 of the Milk Act, defendants desire to reply in detail to certain sub-paragraphs of paragraph 21 of the said bill.

9 (a) Defendants deny that either chapter 357 of the Acts of 1934 or the rules and regulations adopted pursuant thereto, as interpreted by defendants either individually or as a Commission, attempts to interfere with and prohibit the Highland Farms Dairy, Incorporated, from shipping milk into the Commonwealth of Virginia from the District of Columbia, and expressly disclaim any such administrative intention.

(b) Defendants deny that either chapter 357 of the Acts of 1934 or the rules and regulations adopted pursuant thereto, as interpreted by defendants either individually [fol. 86] or as a Commission, attempts to interfere with and prohibit the said plaintiff, Luther W. High, from importing milk into the Commonwealth of Virginia from the District of Columbia, and expressly disclaim any such administrative intention.

(c) Defendants deny that either chapter 357 of the Acts of 1934 or the rules and regulations adopted pursuant thereto, as interpreted by defendants either individually or as a Commission, requires the plaintiff, Highland Farms Dairy, Incorporated, to purchase milk at the price fixed by the rules and regulations of the Commission when, as a part of such purchases, the seller ships and exports said milk

outside of the Commonwealth of Virginia, and expressly disclaim any such administrative intention.

(d) Defendants deny that either chapter 357 of the Acts of 1934 or the rules and regulations adopted pursuant thereto, as interpreted by defendants either individually or as a Commission, requires the plaintiff, Luther W. High, to purchase milk at the price fixed by the rules and regulations of the Commission (or at any other fixed price) when such purchases are made by said plaintiff, Luther W. High, outside of the Commonwealth of Virginia, and expressly disclaim any such administrative intention.

(e) Defendants deny that either chapter 357 of the Acts of 1934 or the rules and regulations adopted pursuant thereto, as interpreted by defendants either individually or as a Commission, is an arbitrary interference with the freedom of contract, or attempts to render invalid the present and existing contracts for the purchase and sale of milk and cream heretofore made by and between the plaintiff, Highland Farms Dairy, Incorporated, and the farmers, producers or milk sheds located in the Commonwealth of Virginia, so far as the purchase of milk and cream by the plaintiff corporation for shipment in interstate commerce. De- [fol. 87] fendants admit their intention of applying the Milk Act, and the rules and regulations adopted pursuant thereto for the Arlington-Alexandria milk market area, to all contracts between the plaintiff corporation and others for the purchase of milk for use in purely intrastate commerce, and deny that the application of the law and the rules and regulations contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no person shall be deprived of property without due process of law.

(f) Defendants deny that either chapter 357 of the Acts of 1934 or the rules and regulations adopted pursuant thereto, as interpreted by defendants either individually or as a Commission, is an aribtrary interference with the freedom of contract and are attempts to render invalid the present and existing contracts for the purchase and sale of milk and cream heretofore made by and between the plaintiff, Luther W. High, and the plaintiff, Highland Farms Dairy, Incorporated, as the defendants, individually and as a Commission, have heretofore in their answer expressly

disclaimed any intention of applying the Milk Act, or its rules and regulations adopted pursuant thereto, in any manner to contracts or transactions made and entered into by and between the plaintiff, Luther W. High, and the plaintiff, Highland Farms Dairy, Incorporated. Defendants admit their intention of applying the Milk Act, and the rules and regulations adopted pursuant thereto for the Arlington-Alexandria milk market area, to all contracts between the plaintiffs for the purchase and sale of milk in purely intrastate commerce, and deny that the application of the law and the rules and regulations contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no person shall be deprived of property without due process of law.

(g) Defendants, individually and as a Commission, ad- [fol. 88] mit that the purchase of milk and cream by the plaintiff, Luther W. High, from the plaintiff, Highland Farms Dairy, Incorporated, as set forth by the plaintiff, Luther W. High, in the last sentence of paragraph 6 of said bill, and in which he says, "The said plaintiff Luther W. High purchases in the District of Columbia, under contracts, all of the output of milk of the said plaintiff Highland Farms Dairy", is a transaction in interstate commerce and is not subject to the provisions of the Milk Act, or the rules and regulations of the Commission, and the defendants expressly disclaim any intention of attempting to apply the Milk Act and/or the rules and regulations to such interstate commerce.

(h) Defendants are not advised as to the allegations contained in sub-paragraph H of paragraph 21 of the said bill, in which it is alleged that the transactions between plaintiffs are conducted and consummated in the city of Washington, District of Columbia, and they neither admit nor deny them. If it is meant by sub-paragraph H that the plaintiff, Luther W. High, purchases milk and cream from the plaintiff, Highland Farms Dairy, Incorporated, in the city of Washington, District of Columbia, and imports it into the Commonwealth of Virginia, defendants admit that such traffic is interstate commerce; but, if it is intended to allege that, because milk and cream are bought in the city of Washington, District of Columbia, imported into the Commonwealth of Virginia, and sold by the importer at

retail in established places of business in Virginia, defendants deny that such transactions constitute interstate commerce.

(i) In sub-paragraph I of paragraph 21 of said bill, it is alleged that the rules and regulations adopted for the Arlington-Alexandria milk market, as interpreted in their administration by the defendants, are void and unconstitutional "for the reason that said rules and regulations are unreasonable, arbitrary and capricious, have no reasonable [fol. 89] relation to their operation and effect to the purpose of the said Commission and contravene the provisions of the 14th Amendment to the United States Constitution providing that no person shall be deprived of property without due process of law." Defendants deny these allegations, although it may be said that they are of such an omnibus character, so indefinite and devoid of specifications that, if necessary to notice them at all, defendants would answer by way of demurrer.

10. Defendants deny the allegation contained in paragraph 22 of said bill, in which it is alleged that the business of each plaintiff, as a distributor, is and will continue to be threatened with total extinction in the Commonwealth of Virginia, resulting in loss and damage, for which neither has, nor can have, relief. Defendants cannot understand why or how the business of the plaintiff, Highland Farms Dairy, Incorporated, can be affected in the Commonwealth of Virginia when, as it has alleged throughout the said bill, its only business consists of wholesale transactions in the city of Washington, District of Columbia; nor can defendants understand in what way the business of the plaintiff, Luther W. High, can be totally extinsuighed in the Commonwealth of Virginia by requiring him to sell milk at the same retail price that all other retail distributors are required to charge their customers. If a market is established in the Arlington-Alexandria area, and prices are fixed for the retail sale of milk in that area, those prices will apply to all engaged in the same line of business, and the plaintiff, Luther W. High, will be on an equal footing with all other distributors of the same class. If no market is established, then the plaintiff, Luther W. High, will be subject to the same competition of other retail milk dealers. In practice, unregulated price fixing by retail milk dealers

will result in price cutting, price cutting in retail sales will [fol. 90] result in demoralizing the market of producers, and a demoralization of that market will ultimately result in the destruction of the dairy industry in the Arlington-Alexandria milk production area, all of which consequences will defeat the very purpose the General Assembly of Virginia had in mind when it passed the Milk Act of 1934.

11. In addition to the charges of the unconstitutionality of the Milk Act upon numerous related and unrelated grounds, the charge is made that the Commission, in establishing the Arlington-Alexandria milk market and in fixing the prices payable to producers and chargeable by distributors, inefficiently and arbitrarily acted at the hearing held by it on February 20, 1936, in that no investigation was made, or sought to be made, of the conditions which, by section 5 of the Milk Act, should have guided the defendants in their conclusion; that the Commission failed and omitted to inquire into the reasonableness of prices to be paid or charged in the said market, and failed and omitted to inquire into the costs of production and distribution; and that the Commission subsequently adopted rules and regulations "arbitrarily and capriciously" fixing and establishing prices to be paid by distributors to producers, and the minimum wholesale and retail prices for said market.

These allegations contained in paragraphs 7 and 18 of said bill, and all other allegations contained in said paragraphs which may not have been denied heretofore, are hereby expressly denied.

12. Defendants show unto the court that printed notices were given of the hearing held on February 20, 1936, in which the public was informed that a meeting called for that day was to be held in the John Marshall Hotel, Richmond, Virginia, to ascertain if it would be to the public interest for the Milk Commission to exercise the power conferred upon it, under chapter 357 of the Acts of 1934, in the Arlington-Alexandria milk market area. The Commission held this meeting upon the written application [fol. 91] of the Virginia-Maryland Milk Producers' Association, as privided for by subsection (i) of section 3 of the Milk Act. The meeting was largely attended by those

interested both in the production and distribution of milk, and the advisability of establishing a milk market in the Arlington-Alexandria area was duly and fully considered. Numerous phases and problems were presented and discussed, and the Commission fully performed its statutory duty in reference to the calling and the conducting of that meeting. The plaintiffs were absent although, because of the general public interest of the producers and distributors in the proposed area and because of the wide circulation of the papers in which the Commission gave formal notice of said meeting, defendants believe and charge that both plaintiffs had ample notice of the time, place and purpose of said meeting of February 20, 1936, and had ample opportunity to attend, and would have received a like opportunity to make objections to the establishment of the market and to amplify their reasons for such opposition. The Commission further believes, and so charges, that the plaintiffs, and each of them, understood and were advised that the Commission did not confine its investigation to the public meeting. It acted with fairness, intelligence and impartiality in determining upon the establishment of the market and the fixing of the minimum [and maximum]* wholesale and retail prices to be charged for milk, and the different prices for different grades of milk. The Commission at the time of its adjournment notified those interested to appear, consult with and give evidence before the Commission and its members as to the cost of production and distribution, including all costs of every character necessarily incurred in compliance with the sanitary regulations in force in the proposed market, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public.

The Commission, as originally constituted, consisted of [fol. 92] its present members.

After the effective date of the Act, which because of its emergency clause was signed by the Governor and went into effect on March 29, 1934, the Commission and each of its members, two of whom were, pursuant to the requirements of the Milk Act practical dairymen and had engaged in the production of milk for a considerable period of time, began an intensive study of the milk production and

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[* Matter enclosed in brackets erased in copy.]

distribution business throughout the State of Virginia and had, prior to the establishment of the Arlington-Alexandria milk market, established numerous milk market areas, and had adopted rules and regulations, including price fixing, for all of said markets. The establishment of said markets has resulted in effectuating the purposes for which the Milk Act was passed, and the Commission has been able to maintain in all of said markets, with the usual exception of violations by chiselers and price cutters, conditions eminently satisfactory to producers, distributors and the general public by insuring to producers a fair and reasonable price for their product, to distributors a reasonable price for their services, and to the general public a high quality of pure milk at a fair and reasonable price.

In the establishment of the markets, the Commission has been guided by a careful, painstaking consideration of all the elements necessary for a fair, well-considered, conscientious determination of the prices payable to producers and the prices chargeable to consumers.

Pursuant to the notice given at the date of the hearing that the Commission would hear all interested in the proposed market for the Arlington-Alexandria area after March 1, 1936, one or more members of the Commission were in constant attendance at the office of the Commission in the Capitol Building, Richmond, Virginia, for twenty-four days—from March 3 to March 28, 1936, both [fol. 93] inclusive—during which period several representatives of the largest distributors in the proposed market came before the Commission, and the Commission went over with these representatives in great detail the cost of distribution in said market. Among those appearing were Mr. Burchell of the Alexandria Dairy Products Company and his auditor; Mr. Davis of the Arlington Dairy, Incorporated, who went into considerable detail as to the cost of distribution in the Arlington-Alexandria milk market area.

The Commission also had before it for consideration the breakdown cost of distribution in a number of widely scattered milk markets throughout the United States, as well as a very extensive breakdown cost of distribution by the largest distributor in the Norfolk market.

In addition, the Commission has had before it a large mass of statistics on production and distribution costs, and,

among other valuable statistics, the Commission had the benefit of "The Virginia Farm Economics", published by the Department of Economics of Rural Sociology, Virginia Polytechnic Institute, Blacksburg, Virginia; "The Dairy Herd Improvement Association", sponsored by the Virginia Polytechnic Institute, Dairy Extension Department, Blacksburg, Virginia; "Marketing Fluid Milk in Four Virginia Cities", published by the Virginia Agricultural Experiment Station, Blacksburg, Virginia; "An Economic Study of Dairy Farming in the Norfolk Milk Shed", published by the Virginia Polytechnic Institute, Virginia Agricultural Experiment Station, Blacksburg, Virginia; "Prices and Consumption of Milk in Specific Cities as Related to Industrial Payroll and Other Industrial Factors", published by the Agricultural Experiment Station, University of Illinois; "Cost of Producing Milk and Dairy Farm Organization in Spokane and Stephens Counties", published by Washington Agricultural Experiment Station, Pullman, Washington; "Farm Profits and Factors Influencing Farm Profits on Ninety-eight Dairy Farms in [fol. 94] Sussex County", published by New Jersey Agricultural Experiment Station, New Brunswick, New Jersey; "Report of Joint Legislative Committee to Investigate the Milk Industry in the State of New York", 1933; "Proceedings of the Middle States Conference of Milk Control", and "Determining a Fair Spread for Distributors."

In connection with the cost of production, the Commission had before it the breakdown of the estimated cost of production of milk in the Arlington-Alexandria area. During the time the Commission had under consideration the fixing of the price to be paid producers, a number of the members of the Virginia-Maryland Milk Producers' Association appeared before it and went into detail as to the cost of the production of milk in the Arlington-Alexandria milk market area.

The prices arrived at by the Commission, as to the cost of production of milk under proper sanitary conditions in compliance with the health laws of the State, induced it to fix the prices payable to producers with reasonable accuracy and certainty, as cost of production is fairly uniform throughout the State of Virginia, although there are variations.

Defendants deny that the assessment of two cents per hundred pounds on all milk sold by distributors is an impost or duty forbidden by Article I of section 8 of the Constitution of the United States, but say that it is levied pursuant to the provisions of subsection (b) of section 11 of the Act complained of for the sole purpose of raising the revenue necessary to cover the cost of administering the said law, and is not levied for revenue purposes and is not excessive for the purposes authorized by the Act.

The breakdown of the cost of production furnished the Commission by the Virginia-Maryland Milk Producers' Association was based upon an attempted survey of its entire membership of 1167, of whom 433 returned replies [fol. 95] to a questionnaire, the form of which was made up by the Bureau of Agricultural Economics of the United States Department of Agriculture. The area covered included the counties of Culpeper, Fairfax, Fauquier, Loudoun, Madison, Orange and Pri-ce William. The reports of the membership were carefully compiled, considered and approved by the Federal Economics Department. In its breakdown, the association fixed the price of feeds at 40.91% of the total cost of production. This estimate of feed cost was adopted by the association from a report of "The Dairy Herd Improvement Association" of the Virginia Polytechnic Institute, Blacksburg, Virginia, for the year 1935, and this Commission accepted that estimate of feed cost production as being as accurate and reliable as any ascertainable, and was largely influenced in fixing its production cost figures. However, the total breakdown, according to the association's survey estimate, cost of production was 30.11¢ per gallon. This was in excess of the estimate of "The Dairy Herd Improvement Association", and the Commission, in its discretion and basing its conclusions upon all the evidence before it fixed 3.08 per 100 pounds, or 26½ cents per gallon as a fair price to producers in the Arlington-Alexandria milk production area.

And now, having fully answered, these defendants pray to be hence dismissed, with their reasonable costs by them in this behalf expended.

(Sgd.) J. S. Agnew, Kone Brugh, T. R. Snavely. State Milk Commission of Virginia, by (Sgd.) [fol. 96] J. S. Agnew. (Sgd.) John S. Barbour. Edwin H. Gibson, P. D.

Duly sworn to by J. S. Agnew. Jurat omitted in printing.

[fol. 97] Legal Notices

Public Hearing for the Arlington-Alexandria Milk Market

On the Twentieth day of February 1936, at Ten o'clock a. m., in the John Marshall Hotel, Richmond, Virginia, a public hearing will be held to ascertain if it will be to the public interest for the Milk Commission to exercise the power conferred under Chapter 357 of the Acts of the General Assembly of 1934 in the Arlington-Alexandria area.

Given under our hand this Fourth day of February, 1936.

Milk Commission of Virginia, E. C. C. Woods, Secretary.

Issue of Feb. 6, 1936.

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Legal Notices

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Given under our hand this Fourth day of February, 1936.

Milk Commission of Virginia, E. C. C. Woods, Secretary.

Issue of Feb. 13, 1936.

[fol. 98] In United States District Court

Amended Answer—Filed June 17, 1936

Now comes the respondents and ask leave to file this their amended answer and to add to the original answer the following paragraph:

The respondents move to dismiss the bill because of the misjoinder of parties plaintiff, a misjoinder of causes of action, and because the bill states no cause of action within

the jurisdiction of this court, and because the bill states no cause for equitable relief.

Respectfully submitted, (Sgd.) Kone Brugh, T. R. Snavely, J. S. Agnew. State Milk Commission of Virginia, by (Sgd.) J. S. Agnew. (Sgd.) John S. Barbour, Edwin H. Gibson, P. D.

[fol. 99] IN UNITED STATES DISTRICT COURT

ORDER FILING AMENDED ANSWER—Entered and filed June 17, 1936

This day came the respondents herein, by counsel, and asked leave of Court to file their amended answer, and on their motion and for good cause shown, it is

Ordered that said respondents be and they hereby are allowed to file their amended answer, and the same is accordingly done.

(Sgd.) Robert N. Pollard, United States District Judge.

June 17, 1936.

[fol. 100] IN UNITED STATES DISTRICT COURT

ORDER DENYING TEMPORARY RESTRAINING ORDER, ETC.—Entered and Filed May 29, 1936

This day came the plaintiffs by their solicitors, and the defendants by the Assistant Attorney General of the Commonwealth of Virginia, upon the Bill of Complaint verified May 27, 1936, and Exhibits thereto annexed, and the affidavit of Luther W. High, sworn to on May 27, 1936, and upon the motion of the solicitors for the plaintiffs for a temporary restraining order enjoining and restraining the defendants during the pendency of this action, and until their application for an interlocutory injunection may be heard:

(a) From enforcing or exercising the powers or any of the powers of the said defendants in the Arlington-Alexandria Milk Market;

(b) From making, adopting, enforcing, promulgating, or putting into effect rules, regulation or orders for the supervision and control of the Arlington-Alexandria Milk Market;

(c) From exercising its powers, enforcing or putting into effect in the Arlington-Alexandria Milk Market, pursuant to the provisions of the Act of the General Assembly of Virginia, approved March 29, 1934, known as The Milk and Cream Act, rules, regulations or orders fixing minimum wholesale and retail prices to be charged for milk, requiring distributors to be licensed, or levying assessments against a distributor of milk which has not been purchased from a licensed distributor as defined in said Act;

and said motion was argued by counsel.

And upon consideration of the Bill of Complaint and Exhibits, and the said affidavit, and upon the argument aforesaid, and upon the assurance of the Assistant Attorney [fol. 101] General of the Commonwealth of Virginia that it is not the intention of the office of the Attorney General nor the intention of the Milk Commission of the Commonwealth of Virginia to apply or enforce the provisions of said Milk and Cream Act, nor the rules, regulations or orders of said Commission to or against the transactions of these plaintiffs in interstate commerce; and upon the further assurance of the Assistant Attorney General that if or insofar as the rules and regulations of the said Commission applicable to the said Arlington-Alexandria Milk Market promulgated March 27, 1936, and to become effective at 12:01 A. M. June 1, 1936, apply to or purport to control the transactions of the plaintiffs in interstate commerce, the same will be administered, and if necessary modified, to avoid application to or enforcement in or upon such transactions in interstate commerce; it appearing to the Court that there is no present danger of irreparable damage being caused to the plaintiffs, the Court is of opinion that the said motion for a temporary restraining order should be, and it is hereby, denied, but without prejudice to the rights of the plaintiffs to make such further application to this Court as they may see fit or as hereinafter indicated;

And it further appearing to the Court that there may arise in the future and after the rules and regulations of the said Commission applicable to the said Arlington-Alex-

andria Milk Market become effective at 12:01 A. M. June 1, 1936, differences of opinion between the plaintiffs and the defendants regarding the character of the transactions of the plaintiffs, or either of them, as being in interstate or intrastate commerce, and with respect to the validity of said rules and regulations in their application to the business transactions of the plaintiffs in said Arlington-Alexandria Milk Market, leave is reserved to the plaintiffs, or either of them, to make such further application to this [fol. 102] Court for a temporary restraining order if and when in their judgment the need therefor may arise; and by consent of counsel for both parties the action of this Court upon the application of the plaintiffs for an interlocutory injunction and for a hearing thereon before three Judges, including a Circuit Judge of the United States, as provided in Section 380 of Title 28 U. S. Code (Judicial Code, Section 266, Amended) is deferred, and this cause continued generally.

Dated in Chambers in the District Court of the United States for the Eastern District of Virginia, at the City of Richmond, in the State of Virginia before the undersigned Judge of said Court, this 29th day of May, 1936.

(Sgd.) Robert N. Pollard, Judge.

[fol. 103] IN UNITED STATES DISTRICT COURT

In Equity. No. 363

HIGHLAND FARMS DAIRY, INCORPORATED, a Corporation, and LUTHER W. HIGH, Complainants,

vs.

J. S. AGNEW, Chairman, and KONE BRUGH and T. R. SNAVELY, as the Members of the Milk Commission of the Commonwealth of Virginia, Defendants

(Argued July 30, 1936. Decided October 3, 1936)

Before Soper, Circuit Judge, and Way and Pollard, District Judges

I Concur. (Sgd.) Luther B. Way, U. S. D. J. (Sgd.) Robt. N. Pollard, U. S. D. J.

Hunton, Williams, Anderson, Gay & Moore, Philip W. Rosenfeld, Counsel for plaintiffs, (E. Randolph Williams,

T. Justin Moore, Stephen H. Simes and Philip W. Rosenfeld, of Counsel) and Edwin H. Gibson, Assistant Attorney General and John S. Barbour, Counsel for Defendants.

OPINION OF THE COURT—Entered and filed Oct. 3, 1936

SOPER, Circuit Judge:

The plaintiffs in this suit in equity challenged the constitutionality of the Virginia Milk and Cream Act, Ch. 357 of the Acts of the General Assembly of Virginia of 1934, and prayed for a temporary and permanent injunction enjoining the members of the State Milk Commission, a body created by the Act, from exercising the powers therein conferred upon it. A court of three judges was organized under the provisions of 26 USCA 380 to consider the case.

Material provisions of the statute may be summarized as follows: The preamble declares that the prosperity and health of the people of the state depend to a substantial degree upon the production and distribution of milk and cream; that the present economic emergency is in part the [fol. 104] result of the disparity between the prices of milk and cream and other commodities which has broken down the orderly production and marketing of milk and cream; that unhealthful, unfair, unjust, destructive and demoralizing trade practices have grown up and are carried on in the production, sale and distribution of milk and cream in the state which impair the constant supply of pure wholesome milk to the inhabitants; and that in order to protect the well being of the people and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution and sale of milk and cream in the state should be supervised and controlled in the exercise of the police power of the state as a business affecting the public peace, health and welfare.

"Distributor" is defined by Section 1 to include amongst others, persons who sell or market milk at wholesale or retail, or who operate stores for the sale of milk at retail for consumption off the premises, and persons, wherever located or operating, whether within or without the state, who purchase, market or handle milk for resale in the state. "Market" means one or more cities, towns or villages of the state and the surrounding territory designated by the Commission as a natural marketing area.

Section 2 of the Act creates a state Milk Commission. Section 3 confers upon the Commission the power, amongst others, (b) to investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the state; (c) to supervise, regulate and control such operations in milk for consumption within the state; (g) to make and enforce rules and regulations necessary to carry out the purposes of the act; (m) to define what shall constitute a natural market area and fix the limits of the area within which milk shall be produced to [fol. 105] supply any such market area; (i) to exercise its powers in any market after a public hearing has been held for such market, and after the Commission determines that it would be to the public interest that it shall exercise its powers in such market. The hearing may be had upon its own motion or upon the application of producers supplying a substantial proportion of the milk consumed in the market or of distributors distributing a substantial proportion of the milk consumed in such market. The Commission may withdraw the exercise of its powers from any market after a public hearing has been held and the Commission determines that it will be to the public interest to do so. The Commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume) of milk distributed in said market acting jointly. (j) The Commission may, after public hearing and investigation, fix the prices to be paid producers by distributors in any market and may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market. In determining the reasonableness of the prices to be charged, the Commission is to be guided by the cost of production and distribution, including compliance with sanitary regulations, operation and delivery charges, and the welfare of the public. The Commission may require all distributors in any market to be licensed by the Commission for the purpose of carrying out the provisions of the act. It may decline to grant any license and suspend or revoke a license upon due notice, and after hearing under Section 6 any order of the Commission in refusing to issue a license or suspending or revoking a license may be reviewed on appeal to the Supreme Court of Appeals.

Under Section 4, no distributor in any market in which the act is in effect shall buy milk from producers or others [fol. 106] for sale within the state, or sell or distribute milk within the state unless such distributor is duly licensed under the act. It is unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed under the act.

Section 8 provides substantial penalties to be imposed upon any person found guilty of failing or refusing to comply with any subpœna issued by the Commission. Section 9 provides that the Milk Commission shall prepare an annual budget and collect the sums required therefor from the local milk boards in the form of monthly assessments, which will not exceed 2¢ per hundred pounds of milk handled in each market. The Local Milk Boards, provided under Section 11, consisting of five members, are to be established by the producers and distributors in a market area to carry out the provisions of the act in conjunction with the State Milk Commission. The expenses of the Milk Board, including the assessment levied by the State Milk Commission, shall be met by an assessment of not over 2¢ per hundred pounds of milk handled by distributors, and not over 2¢ per hundred pounds sold by producers. Section 13 provides that any person violating any provision of the act or of any license issued by the Commission shall be guilty of a misdemeanor and punished by fine of $25 to $100 or imprisonment in jail for not less than thirty days or more than one year, or by both fine and imprisonment. Section 14 provides that no provision of the act shall apply or be construed to apply to foreign or interstate commerce unless the same may be effective pursuant to the Federal Constitution. Section 16 provides that if any part of the act shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby. Section 17 provides that the period of public emergency during which the act shall be effective shall be until such date as the legislature may designate to be the termination thereof, or if the [fol. 107] legislature be not in session, the date so designated by a proclamation of the governor.

The parties have agreed upon a stipulation of facts from which it appears that the Highland Farms Dairy, Incorporated, is a Virginia corporation which has its principal place of business in the District of Columbia where it

operates a creamery for the pasteurizing and processing of milk, all of which it sells under contract to the individual plaintiff, Luther W. High, a resident of the District of Columbia. High operates a group of retail stores for the sale of dairy products in Virginia, Maryland and the District of Columbia, and purchases all of the milk sold by him in Virginia from the Highland Farms Dairy. The latter purchases its milk under contract from farmers and producers in Virginia, Maryland and the District of Columbia, for delivery to the creameries in Washington. About 20% of this milk is purchased from Virginia producers, substantially all of which is produced in an area which has been designated by the Milk Commission as the Arlington-Alexandria Production Area. All of this milk, when received at the dairy, is commingled with milk purchased elsewhere, and it is impossible to determine what portion of the milk eventually sold by High in the territory designated by the Milk Commission as the Arlington-Alexandria Sales Area was originally produced in the said production area.

High makes no delivery of milk, but sells it all for cash at retail in bottles to purchasers at his stores. It is therefore essential to his business that there be a differential between the price charged by him and the prices of other distributors who permit charge accounts and make deliveries. The bottled milk distributed by High in Virginia is sold to him in the District of Columbia but is delivered to his Virginia stores by the dairy trucks upon orders received by telephone.

On March 27, 1936, the State Milk Commission established the Arlington-Alexandria Milk Market, and fixed the prices [fol. 108] at which milk should be sold therein. This was done after a public hearing at Richmond, Virginia, on February 20, 1936, which was called by the Commission at the request of the Virginia and Maryland Milk Producers' Association to consider the establishment of such a market. Notice of the meeting was advertised in two newspapers in the area affected from February 6 to February 17, 1936, two notices appearing in one paper and three in another. Consequently producers, consumers and distributors in the area generally had knowledge that the hearing was to be had. Neither of the plaintiffs, however, was present at the meeting or represented thereat. The Commission gave notice at

the hearing that it would consult with any group with regard to the establishment and the regulations to be issued, and this offer was accepted by various individuals between the date of the hearing and the establishment of the area. In establishing the market and the governing rules and regulations, the Commission considered not only the statements and testimony that were made at the public hearing, but also certain treatises upon the production and distribution of milk. The sales and production areas and the governing rules and regulations were finally made effective on June 1, 1936. Plaintiffs had knowledge of the establishment of the area and of the adoption of the rules and regulations, but continuously sold milk at prices lower than the minimums prescribed for wholesalers and retailers respectively in the regulations adopted. For example, the prices per quart fixed by the Commission for the sale of cultured whole milk at wholesale and retail and the prices actually charged therefor by the dairy to High at wholesale, and by High to consumers at retail, were as follows:

	Wholesale	Retail
Commission's price	11¢	13¢
Dairy's price in Washington	6¢	
High's price in Virginia		8¢

[fol. 109] A bill similar in purpose to the act finally passed by the Virginia legislature was introduced in the House of Delegates on February 19, 1934, but was rejected by a vote of that body on March 5, 1934. The bill, which eventually became the Milk and Cream Act, was introduced on March 10, 1934, the last day of the session, accompanied by a letter from the governor of the state urging its passage. It passed both houses of the legislature on that day, printings and constitutional readings being waived.

The original bill of complaint was filed herein on May 29, 1936, and prayed for a temporary restraining order enjoining the Milk Commission from exercising its powers in the Arlington-Alexandria Milk Market during the pendency of the action and until the application for interlocutory injunction could be heard. The District Judge, however, refused a restraining order upon the ground that there was no showing of a present danger of irreparable damage, without prejudice to the right of the plaintiff to make subsequent applications. High made no application

for a license under the act, and on June 6, 1936, the Commission threatened to invoke against him the remedy of injunction specified in Section 12 of the act wherein it is provided that if any person fails to comply with any rule or order of the Commission, the Hustings Court of the City of Richmond, upon application of the Commission, shall compel obedience by attachment proceedings for contempt. The amended bill of complaint was thereafter filed in which application for a temporary restraining order and an interlocutory and permanent injunction was renewed; and an answer having been filed, the case came before the court upon these applications.

The plaintiffs' contentions with reference to the constitutionality of the act may be summarized as follows:

(I) The act cannot be upheld as an emergency price fix-[fol. 110] ing measure in the exercise of the police power of the state because (a) there was a total absence of any legislative investigation into the facts; and (b) the legislature did not determine that an emergency existed, but (1) delegated the power to the Commission to determine whether or not the emergency existed, and if so, in what parts of the state; and (2) authorized the producers and distributors controlling a majority in volume of the milk in any market to put an end to the operation of the act therein; and (3) failed to fix a definite time limit to the operation of the act.

(II) The act is invalid because it contains a delegation of legislative power to the Milk Commission contrary to the state constitution to establish markets and exercise its powers of control over the sale of milk therein and to withdraw the exercise of its powers from such market, to fix prices of the sale of milk, and to issue and revoke licenses to persons to engage in the milk business without reference to any prescribed standard.

(III) The exercise of the powers conferred upon the Commission, as above set out, necessarily involved a denial of the equal protection of the laws and a denial of due process in contravention of the Fourteenth Amendment to the Federal Constitution.

(IV) The action of the Milk Commission in (1) establishing a market, (2) in fixing minimum prices and (3) in adopting rules and regulations, constituted a denial of due process because of procedural errors on the part of

the Commission in that (1) the action was based in part on data not introduced in evidence at the public hearing and (2) no evidence as to the cost of the production of milk was taken at that hearing.

(V) The act and the regulations passed by the Milk Commission are invalid because they constitute an interference on the part of the state with interstate commerce in that (1) they required the Highland Farms Dairy, a corporation [fol. 111] of the District of Columbia, doing no business in Virginia, to secure a license in order to engage in interstate commerce; (2) and fixed the prices to be paid by High to the Highland Farms Dairy for milk sold to him by the corporation in the District of Columbia; and (3) authorized the Commission to levy an assessment on milk shipped in interstate commerce.

The authority of a state legislature in the exercise of the police power to regulate the price of milk through the agency of an administrative board is established by the decision of the Supreme Court in Nebbia vs. New York, 291 U. S. 502. An act of the state legislature was upheld which established a milk control board with power, among other things, to fix the retail prices to be charged for milk for consumption off the premises where sold. The court held that the rights of property and of contract are not absolute and that the Fifth Amendment, in the field of federal activity, and the Fourteenth as respects state action, do not prohibit governmental regulation of private business for the public welfare, but require only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object to be attained; that the private character of a business does not exempt it from price regulation in the common interest, and that the New York legislature, having found that the low price of milk in the state had led to a demoralization of the market and affected the health and prosperity of the people, the legislature acted within the scope of its power in prescribing the regulation described. For later decisions of the Supreme Court see Borden's Co. vs. Baldwin, 293 U. S. 194 and Borden's Co. vs. Ten Eyck, 297 U. S. 251.

Of equal importance in the determination of the pending case is the decision of the Supreme Court of Appeals of Virginia in Reynolds vs. Milk Commission of Virginia, 163

Va. 957, 179 S. E. 507, in which the constitutionality of the [fol. 112] Virginia Milk Control Act was upheld by a divided court. It was held that there are no substantial differences between the Virginia Act and the New York Act, and that the Virginia Act does not contravene the Fourteenth Amendment of the Federal Constitution, or the similar provision found in Section 1, Article 1 of the Virginia Constitution, but, on the contrary, is a proper exercise of the police power of the state in the public interest in view of the uncontroverted finding by the Virginia legislature of an imperative need to regulate the milk industry in the state even to the extent of fixing prices so as to protect the industry from serious impairment or destruction.

The court declared that the state legislature was better qualified than the court to determine the necessity and degree of regulation of an industry, and that its conclusions should not be disturbed unless they are clearly arbitrary and unreasonable. It was pointed out that arbitrary regulations issued by the Board might be invalid without affecting the constitutionality of the act, and that if the Commission should promulgate such regulations, the courts would declare them to be void.

The court considered the argument that the power given to the Commission to make and enforce rules and regulations was a delegation of legislative power to enact prohibitory legislation operative only in certain areas defined by the Commission and showed that a similar provision had been upheld in the Nebbia case.

Similarly, State Milk Control Acts have been held valid as within the police power of the state in the following decisions of state courts. People vs. Nebbia, 262 N. Y. 259; State vs. Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116; State ex rel. Finnegan vs. Lincoln Dairy, (Wisc.) 265 N. W. 197; Albert vs. Milk Control Board, (Ind.) 200 N. E. 688; Rohrer vs. Milk Control Board (Pa.) 186 Atl. 336; Franklin vs. State, (Ala.) 169 So. 295; Miami Home Milk Pro- [fol. 113] ducers Assn. vs. Milk Control Board, (Fla.) 169 So. 541. In three states, the Supreme Court without questioning the extension of the police power to cover price fixing regulations by state boards under Milk Control Acts, have declared the local statutes invalid because of an improper delegation of legislative power. See Griffiths vs. Robinson, 181 Wash. 438, 43 P. (2) 977; Md. Cooperative

Milk Producers vs. Miller, (Md.) 182 Atl. 432; Van Winkle vs. Fred Maier, (Ore.) 49 P. (2) 1140.

Notwithstanding these decisions, the plaintiffs contend that the Virginia act is unconstitutional as a violation of the due process clause of the Fourteenth Amendment for reasons not considered in Reynolds vs. the Milk Commission. It is conceded that the legislature may have had power to pass a milk control price fixing act, if the legislature had found that the circumstances of emergency described in the preamble of the act actually existed; but it is asserted that the legislature failed to make such a determination and left the matter to the uncontrolled discretion of the Milk Control Board. It is said that there was no investigation by legislative committee, such as preceded the passage of the New York act, but the Virginia act was hastily passed on the last day of the legislative session; that under Section 3 (i) the act does not become effective in any marketing area until the commission, after public hearing, determines that it will be to the public interest to exercise its powers therein, and that the commission is authorized to withdraw from any market after a similar hearing and determination; that the failure of the legislature to exercise its own authority is further shown by the provision of Section 3 (i) which gives to a majority of the producers of milk produced and to a majority of the distributors in any market acting jointly the right to cause the Commission to withdraw from that market; and that finally, there was a lack of definite action on the part of the legislature because it made no provision for the termination of [fol. 114] the act other than Section 17 which provides that the period of public emergency, during which the act shall be effective, shall be until the legislature designates the termination, or if it be not in session, the date designated by the proclamation of the governor.

This construction of the act cannot in our opinion be upheld. We may not disregard the positive declarations of the preamble merely because there was no formal investigation by a legislative committee and the statute was passed on the last day of the session. Indeed the rejection of the measure proposed earlier in the session indicates that the subject had been considered with some deliberation. Nor is the interpretation contended for in accord with the decision of the Virginia court in Reynolds vs. Milk

Commission, which points to the legislative determination of fact in the preamble as indicating an imperative need of state control of the production and distribution of milk. Not only is this interpretation binding upon us as the construction of a state act by the highest court of the state, but it is in harmony with our understanding of the legislative intent. We do not think that the authority given to the Board to determine in what areas it should exercise its powers contradicts or nullifies the legislative finding, or amounts to an improper delegation of legislative power. It is merely left to the Board to ascertain whether trade practices, harmful to the public interest, are prevalent in a particular area, and if so, to exercise the power to make rules and regulations and fix prices for the milk produced and distributed therein. The New York act differed in that it was made effective generally, but broad discretion was conferred upon the State Milk Control Board under Section 312 of the act to investigate the reasonable costs and charges for producing milk and to fix the minimum prices to be paid to purchasers of milk in its various grades. Provisions quite similar to the Virginia act are found in the statutes [fol. 115] passed in 1935 in Alabama, p. 204, Section 5; in Wisconsin, Chapter 58, Sections 3 (1) (c), 3 (3) (a) and (b); and in Indiana, Ch. 281, Section 15.

There is no impropriety in the legislative delegation of authority to the executive to act or withhold action in carrying out the legislative intent in conformity with principles laid down in the governing law. Thus Congress may empower the President, when in his opinion the public safety shall require, to lay an embargo on ships in the ports of the United States. Field & Co. vs. Clark, 143 U. S. 649, 683; or to discontinue the suspension of commercial intercourse with foreign countries, required by an act of Congress; or to suspend by proclamation the free introduction into this country of enumerated articles when satisfied that unreasonable exactions are imposed upon the products of the United States by the country producing them, or to increase or decrease tariff duties so as to equalize the differences between costs of production at home and abroad. Hampton & Co. vs. United States, 276 U. S. 394. See also United States vs. Grimaud, 220 U. S. 506 and Fallbrook vs. Bradley, 164 U. S. 112.

Hence we reject the suggestion that the Arlington-Alexandria Milk Market was illegally established by the Milk Commission in the exercise of an arbitrary power and discretion conferred upon them by the legislature without any legislative standard of action to guide them. We also conclude that this action of the Commission is not invalidated because the legislature in Section 3 (i) directed the Commission to withdraw the exercise of its power from any market upon the written application of a majority of the producers and a majority of the distributors of milk, measured by volume, in said market acting jointly; or because the governor of the state was empowered by Section 17 of the act, if the legislature be not in session, to designate by [fol. 116] proclamation the termination of the period of public emergency during which the act shall be effective. No attempt has been made in this case to exercise the powers so described, and we have no occasion to decide whether they may ever be lawfully exercised by the persons named. But even if these provisions are invalid because they contain no guide as to the conditions under which the powers conferred may be exercised, it does not follow that the legislature has not actually found that the emergency exists. The incorporation of invalid sections does not destroy the whole act, because it is provided in Section 16 thereof that if any section, clause, sentence or paragraph thereof be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby.

Having declared the emergency and the necessity for regulation of the business, the legislature was not without power to delegate to the Board the authority to limit the market areas, to fix the prices to be charged therein, and to issue and revoke licenses to persons engaged in the milk business. These questions did not pass unnoticed by the Virginia court in Reynolds vs. Milk Commission, either in the majority or minority opinions, where references were made to the power of the board to make rules and regulations necessary to carry out the purposes of the act and to grant and refuse licenses, subject to the review of that court. It is clear that the court would not have sustained the act had the majority of the judges thought that an unconstitutional delegation of power had been granted. The New York act of 1933, Ch. 158, considered in the Nebbia case, provided in Section 312 (b) that the Board should fix

prices, which might vary in different markets, and designate the markets to which the prices should be applicable. Prices fixed by the Board did vary as to classes of dealers and localities. See Nebbia vs. New York, 291 U. S. 502, 520, [fol. 117] 540; and it does not appear that the act was deemed to be invalid on this account either in the Supreme Court of the United States or the Court of Appeals of New York. See People vs. Nebbia, 262 N. Y. 259. The question as to price was definitely decided adversely to the defendants' contention under the New Jersey Act in State vs. Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116, 124, where it was held that the legislature having declared the general policy and set the standard to be followed, properly left it to the administrative agency to take proper steps to eliminate destructive trade practices and to fix prices with reference to the grade of milk, costs of production, marketing and transportation so as to permit a reasonable return to the producer and the milk dealers. A similar standard was set up in Section 3 (j) of the Virginia act. See also State vs. Lincoln Dairy Co., (Wisc.) 265 N. W. 197; Albert vs. Milk Control Board of Ind., 200 N. E. 688, 694; Rohrer vs. Milk Control Board of Pa., 186 Atl. 337; Franklin vs. State, (Ala). 169 So. 295; Miami Home Milk Producers Assn. vs. Milk Control Board, (Fla.) 169 So. 541. Compare, Griffiths vs. Robinson, 181 Wash., 438, 43 P. (2d) 977; Maryland Co-operative Milk Producers vs. Miller, (Md.) 182 Atl. 432; Van Winkle vs. Maier, (Ore.) 49 P. (2) 1140.

In the pending case, the Milk Commission held a public hearing to consider the propriety of exercising its powers in the area affected, and subsequently outlined the Arlington-Alexandria Sales Area and the Arlington-Alexandria Production Area, and passed rules and regulations which undertook to control the production and distribution of milk and fixed the prices to be paid for the product. There is no distinction between the action thus taken in conformity with the standards laid down by the legislature and conduct which was approved in the cited cases.

The plaintiffs emphasize the license provisions of the act, contending that here, in any event, are provisions so [fol. 118] devoid of legislative standard as to leave to the Commission the unrestricted power to grant or refuse a license to a dealer in milk in its arbitrary discretion; and it is contended that these provisions not only involve an

unlawful delegation of power, but in their effect amount to a denial of due process of law guaranteed by the Fourteenth Amendment. The license provisions are as follows:

Section 3. (k) The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the commonwealth.

Section 5. An application to the commission for a license to operate as a distributor shall be made by mail or otherwise within five days after the provisions of this act become effective in a market, and as to any distributor thereafter beginning business, before such distributor shall begin such business therein. The application shall be made on blanks furnished by the commission for the purpose.

Section 6. Any order of the commission in refusing to issue a license, or suspending or revoking a license, may be reviewed on appeal to the Supreme Court of Appeals.

Section 8. * * * In the event any person shall fail to comply with any rule, regulation or order of the commission, * * * it shall be the duty of the Hustings Court of the City of Richmond, * * * upon application of the commission, to compel obedience by attachment proceedings for contempt. * * *

Section 12. In the event of violation of any provision of this act, in addition to any other remedy, the commission may apply to any court of record in the city of Richmond for relief by injuction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist.

Section 13. Penalties. Any person violating any provision of this act or of any license issued by the commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more

than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, and each day during which such violation shall continue shall be deemed a separate violation. • • •

The stipulation shows that the Milk Commission has threatened to invoke against High the remedy by injunction provided in Section 12 of the act, so as to restrain him from [fol. 119] continuing his business as a milk dealer without first having obtained the required license, and also from violating the regulations of the commission as to retail sale prices. It does not appear that High has ever made application for a license or intends so to do; and the only reasonable inference to be drawn from the institution and prosecution of this case is that the plaintiffs, regarding the act as unconstitutional, propose to continue their trade practices irrespective of its provisions.*

On the other hand, no conditions or restrictions upon the grant of licences have been imposed in the regulations of the Board, and there is no indication that a license would be withheld from any one willing to abide by the terms of the statute. In Reynolds vs. Milk Commission, 179 S. E. 507, 514, it was said that the license provision was not challenged. It might be proper also in the pending case to disregard it in the absence of arbitrary and unreasonable conduct on the part of the commission, and of any evidence that such conduct is contemplated. Nevertheless, it is not inappropriate to point out that the license provisions of the act should not be interpreted to vest the Board with the absolute power to grant or refuse licenses, if any other reasonable instruction can be adopted. Such a grant of power would be invalid and the attempt to ex-

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* No other Milk Control Act, to which our attention has been called, contains conditions of like breadth. The New York Act of 1933, for example, contains in Section 303 (3) specific terms listing the acts or omissions which justify the rejection or suspension of a license, such as unreasonable rejection by a distributor of milk purchased from a producer or failure to pay for milk purchased, or violating any provision of the act.

ercise it arbitrarily would be restrained by a court of equity as a violation of the due process clause of the Fourteenth Amendment. Yick Wo vs. Hopkins, 118 U. S. 356; Lieberman vs. Van De Carr, 199 U. S. 552; Douglas vs. Noble, 261 U. S. 165; Lehmann vs. State Board of Public Accountancy, 263 U. S. 394.

[fol. 120] In our opinion, the act is susceptible of a more reasonable interpretation. It was not the intent of the legislature to confer upon the administrative board the extraordinary power to determine at will who should and who should not engage in the distribution of milk, but rather to render available to the Milk Commission and the local boards a list of authorized distributors of milk and to enable the authorities more readily to supervise the business of distribution and to enforce the rules, regulations and orders promulgated by the Board. In the absence of provision to the contrary, it would appear to be the duty of the Board to issue a license to any distributor complying with the statute and to preserve his license until some violation of the act or of a regulation or order had taken place. Such a standard would be sufficient to sustain the act although less specific in detail than other similar statutes. In Liebermann vs. Van De Carr, 199 U. S. 552, the Supreme Court considered a section of the Sanitary Code of New York City, which provided that no milk should be received for sale and delivered in the City of New York without a permit in writing from the Board of Health. It was objected that the statute devolved upon the Board of Health absolute and despotic power to grant or withhold permits to milk dealers and was therefore not due process of law. The Supreme Court, commenting on the decisions of the New York courts which indicated the power to issue or withhold permits must be used in the exercise of a reasonable discretion and that arbitrary action and unjust discrimination would not be tolerated, said:

"That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people there can be do doubt."

After citing certain cases, the court continued:

"These cases leave in no doubt the proposition that the [fol. 121] conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a federal court."

In Smith vs. Cahoon, 283 U. S. 553, 562, it was said:

"The principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration."

See also Lehmann vs. State Board of Public Accountancy, 263 U. S. 394; Continental Baking Co. vs. Woodring, 286 U. S. 352, 366-7; The Problem of Apparently Unguided Administrative Discretion by Lewis Allen Sigler, 19 St. Louis L. R. 261, 291, et seq.

The cases we have cited also dispose of the contention that the enforcement of the act necessarily entails a denial to the plaintiffs of the equal protection of the laws and the due process of law in violation of the Fourteenth Amendment. Thus in Nebbia vs. New York, supra, it was held that a storekeeper was not denied the equal protection of the laws by an order which required him, if he purchased his supply from a dealer, to buy and sell the product at a minimum price, whereas the dealer might buy his supplies from the farmer and sell them at lower prices, and that such an order was not on its face arbitrary or unreasonable, as there are obvious distinctions between the two sorts of merchants which might well justify a different treatment. Likewise, it was decided that there was no denial of due process in the general scheme of the act be-

cause the state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare and if laws passed to that end have a reasonable relation to the legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satis-
[fol. 122] fied. (See pages 530-537.)

Nor does the failure of the legislature of Virginia to provide for an appeal to the courts from the decisions or orders of the Board in relation to such matters as the determination of market areas and the fixing of prices amount to a denial of due process. It is true that if a legislature attempts to make the findings of fact of its agencies conclusive, even though the findings are wrong and constitutional rights have been invaded, the legislative action is invalid, for the judicial power of the courts cannot thus be circumscribed. St. Joseph Stock Yards Co. vs. United States, 298 U. S. 38; Ohio Valley Water Co. vs. Ben Avon, 253 U. S. 287; Chicago M. & St. P. R. Co. vs. Minnesota, 134 U. S. 418. But the statute under consideration does not attempt to circumscribe the powers of a court, and it is not invalid simply because it does not specifically provide for access to the courts. Such access always exists if there is any arbitrary action on the part of the legislature or of a legislative agency which deprives a citizen of his constitutional rights. See Prentis vs. Atlantic Coast Line, 211 U. S. 210; Louisville & Nashville R. R. Co. vs. Garrett, 231 U. S. 298, 310; Coal & Coke Ry. Co. vs. Conley, 67 W. Va. 129, 67 S. E. 613; Weimer vs. Bunbury, 30 Michigan, 201.

It seems also to be suggested that the whole act violates the Fourteenth Amendment because of the penal provisions of Section 8 and 13. Section 8 imposes a penalty not exceeding $100. or imprisonment not exceeding 90 days upon any person failing or refusing to comply with any subpoena issued by the Commission and each day during which the violation continues is deemed a separate offence. Section 13 imposes a penalty by fine of not less than $25. or more than $100. or imprisonment in jail for not less than thirty days nor more than one year, or both fine and imprisonment, upon any person violating any provision of the act or of any license issued by the Commission, and each day dur-
[fol. 123] ing which the violation continues is deemed a separate violation. No attempt has been made in this case to enforce a penalty under either section. Even if it be sup-

posed that these penalties are so excessive in their cumulative effect that defense in a criminal case would not afford a reasonable opportunity to test the propriety of the action of the commission, it does not follow that the whole act is invalid. The procedure to be followed with regard to such penalties, when the enforcement of the orders of a legislative agency or administrative body is resisted on constitutional grounds, is suggested by the decision in Oklahoma Operating Co. vs. Love, 252 U. S. 331. Under the statute considered in that case, the order of the State Corporation Commission was not reviewable in any court of the state and the only opportunity for a judicial test was to disobey the order and to apply to the Supreme Court, meanwhile running the risk of the imposition of accumulating penalties, not exceeding $500. a day. It was held that the provision for the enforcement of the act by penalties was violative of the Fourteenth Amendment, and that the plaintiff was entitled to a temporary injunction in the federal court restraining the enforcement of the penalty pending the final hearing upon the constitutionality of the order. If, upon final hearing, the order should be found to be invalid, permanent injunction against the enforcement of the order should be issued, and likewise, if the order should be found to be lawful, permanent injunction should nevertheless be issued to restrain enforcement of penalties pendente lite, provided that it be found that the plaintiff had reasonable ground to contest the order. Compare Missouri Pac. R. Co. vs. Nebraska, 217 U. S. 196; Wadley Southern R. Co. vs. Georgia, 235 U. S. 651.

The plaintiffs also complain that the action of the Milk Board in establishing the market area and fixing the minimum prices for production and distribution of milk was not had in accordance with the provisions of the statute, and [fol. 124] was taken in violation of due process of law. The point relates to the nature of the public hearing which the Commission conducted. Section 3 (i) provides that the Commission shall not exercise its power in a market until a public hearing has been held for such market and the Commission determines that it will be to the public interest to exercise its powers therein; and Section 3 (j) provides that the Commission, after public hearing and investigation, may fix the prices to be paid producers by distributors and to be charged in the wholesale and retail distribution

of milk, taking into consideration in determining the reasonableness of the prices, the cost of production and distribution, and the welfare of the general public.

A public meeting was held in Richmond, Virginia, on February 20, 1936, at which were present a score of dairymen and milk producers and some discussion as to the establishment of the market area and the prices of milk took place. It is stipulated that thereafter the Commission established the area and the rules and regulations not only upon the basis of the information obtained by it at this public hearing, but also upon the basis of information subsequently furnished it by interested persons during the month of March, the Commission having announced at the hearing that it would receive additional communications. The Commission also took into consideration certain treatises which the Commission had in its files or received subsequent to the hearing bearing upon the general subject of the marketing of milk. It is contended that not only was the evidence presented at the hearing entirely inadequate to enable the commission to ca[redacted] the duties imposed upon it by the act, but that the [redacted]ission violated the rules or proper procedure when [redacted] into consideration material not offered at the hearing.

The plaintiffs particularly rely [redacted] decision in Morgan vs. United States, 56 S. Ct. 906, which dealt with the [fol. 125] duty imposed upon the Secretary of Agriculture to grant a full hearing and receive evidence before fixing rates for stock yard services under the Packers' and Stock Yards' Act of 1921. It was held that while the order of the Secretary was legislative, the proceeding had special attributes, and that the Secretary was required to make his determination in accordance with the procedural requirements contemplated by the statute, including a full hearing and the reception of evidence adequate to support the necessary findings of fact. Attention was called to the provision of the Packers' and Stock Yards' Act which makes applicable to the jurisdiction, powers and duties of the secretary, all laws relating to the suspension or restraint of the enforcement of orders of the Interstate Commerce Commission. The cases cited by the Supreme Court show that it is well established that a proceeding of this character before the Interstate Commerce Commission has a quasi judicial character and that the usual incidents of due proc-

ess applicable to an adversary proceeding must be followed.

But it is our view, expressed in the absence of a controlling interpretation by the state court, that these cases have no application to the sort of hearing contemplated by the Virginia Milk Control Act. The proceeding before the Milk Commission was not quasi judicial but legislative. It is true that the act made provision for a public hearing without which the Commission was not authorized either to exercise its powers in any market area or to fix prices; but this hearing was to be of the same nature as that held by a legislative committee in considering proposed legislation. The act contains no directions as to the kind of notice to be given, and evidently merely contemplated notice by advertisement to the general public. No other notice was feasible, considering the large number of persons engaged in production and distribution of milk. The commission [fol. 126] was undoubtedly justified in the exercise of its legislative function in taking into consideration not only the facts presented at the public hearing, but those which came to it subsequently from interested parties or were disclosed by its own investigation into the facts and the literature bearing upon the subject. See State vs. Newark Milk Co., 179 A. 116, 125-6; Norwegian Nitrogen Co. vs. United States, 288 U. S. 296, 308.

Even if the commission's hearing was quasi-judicial, the plaintiffs have small ground to complain. Although wide publicity was given prior to the hearing, the plaintiffs failed to attend and offer evidence; nor have they since applied to the Board for a modification of this action on the ground that it was arbitrary or ill advised. The courts have quite generally taken the position that one who complains of the unreasonable character of rules and regulations adopted by an administrative board must seek relief from the board before applying to the courts. See Red "C" Oil Mfg. Co. vs. Board of Agriculture, 222 U. S. 380, 394; Hegeman Farms Corp. vs. Baldwin, 293, U. S. 163, 172; Peterson Baking Co. vs. Bryan, 290 U. S. 570, 575; Reynolds vs. Milk Commission, 179 S. E. 507, 515; Rohrer vs. Milk Control Board, 186 Atl. 326.

Finally, the complainants say that the act and the regulations in pursuance thereof are invalid because they impose a burden on interstate commerce in violation of Sections 8 and 10 of Article 1 of the Federal Constitution. The

argument rests, so far as Section 8 is concerned, upon the interpretation of certain provisions of the act to mean that a distributor of milk in an area established by the Commission is forbidden to buy from a distributor located beyond the borders of the state unless the latter shall have first obtained a license from the Commission, and also that the distributor beyond the state, unless licensed, is forbidden to make such a sale; and that if the foreign distributor is licensed, he shall conform to the prices fixed by the com- [fol. 127] mission and shall comply with its rules and regulations and orders, subject to incurring the penalties prescribed by the act. This interpretation is based upon the definition of "distributor" in Section 1 of the act to include persons, wherever located or operating, whether within or without the Commonwealth of Virginia, and upon the provisions of Section 4 that no distributor in a market in which the provisions of the act are in effect shall buy milk from producers or others for sale within the state, or sell milk within the state unless the distributor is duly licensed under the provisions of the act, and providing further that it shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by the act.

If the act is given this meaning, it is doubtless invalid as a direct and unconstitutional burden on interstate commerce. In Baldwin vs. G. A. Seelig, 294 U. S. 511, the Supreme Court held that a law or regulation of the State of New York was invalid, as a violation of Article I, Sec. 8, Clause 3 of the Constitution, which prohibited the sale of milk imported from another state unless the price paid therein to the producer was equal to the minimum prescribed by New York for purchases from local producers. We think that the act does not have the meaning attributed it, although the language of the sections under discussion give some support to the complainants' argument; for when the act is considered as a whole, including the admonition of Section 14 that no provision of the act shall be construed to apply to foreign or interstate commerce except insofar as the same may be effective pursuant to the United States Constitution, it is seen that the act was not designed to apply to a distributor beyond the state either as to prices or licenses.

Section 3 (j) of the act gives the Commission power to establish markets and to fix prices to be paid to producers

by distributors, and wholesale and retail prices to be [fol. 128] charged by distributors therein. The term "market" means any city or town of the commonwealth or two or more cities and towns and surrounding territory designated by the commission as a natural marketing area. Obviously the area designated is to be confined by the Commission to territory within the State of Virginia, and consequently the power of the commission to fix prices in any market is to be enforced only within the state.

Likewise, Section 3 (k) provides that the Commission may require all distributors in any market designated by the commission to be licensed by the commission, so that here also the powers of the commission are restricted to Virginia territory.

Sections I (II) and 4 are broader in their literal significance; but when it is borne in mind that the Dairy in the instant case is not required by the act to be licensed, or to sell at prices fixed by the commission, since it is located in Washington and is not a distributor in any market designated by the commission, it is seen that the act does not forbid High from purchasing milk from the Dairy in the District of Columbia, or fix the price which he shall there pay. Furthermore, even if the plaintiffs correctly construe these provisions of the act, the whole does not fall because Section 16 provides that if any section, clause, sentence or paragraph be declared unconstitutional, the remainder of the act shall not be affected thereby.

The violation of Section 10 of Article 1 of the Constitution complained of is that the act imposes a tax or assessment upon milk imported into Virginia and therefore without the consent of Congress, lays an impost or duty upon imports not absolutely necessary for executing its inspection laws. The assessment complained of was provided to cover the expenses of the Milk Commission and the local Milk Boards to be appointed to carry out the purposes of the act. The relevant provisions of the act and of the regulations in pursuance thereof are as follows:

[fol. 129] Section 9. The Milk Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the local milk boards in the form of monthly assessments, and the local milk boards shall pay the assessments so levied. The assessments so

levied shall not exceed two cents per hundred pounds of milk handled in each market in which the provisions of this act are in operation.

Section 11. (b) Expenses.—The expenses of the milk board, including salaries and/or the per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this act, and including the assessments levied by the State Milk Market Commission, shall be met by an assessment of not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat (sold by producers.

Regulation No. 6. Assessments by the Milk Board. Each distributor shall pay to the Milk Board all assessments levied on him by the Milk Board (except on that milk which has been purchased from licensed distributors) and shall deduct and pay to the Milk Board all assessments levied by the Board on each producer delivering milk to him. No assessment on producers shall exceed 2¢ per hundred pounds of milk, and no assessment on distributors shall exceed 2¢ per hundred pounds of milk. 1¢ per hundred pounds of milk shall be levied and collected by the Milk Board on all milk received by a distributor and 1¢ per hundred on all milk sold or used by a distributor. Such assessment shall be collected on the fifteenth day of each month following the previous delivery period, and delivered to the secretary of the State Milk Commission for deposit to the account of the State of Virginia.

It thus appears that the Milk Commission, in order to cover its own expenses, has directed the levy of an assessment of 1¢ per hundred pounds on milk received by a distributor and 1¢ per hundred pounds on milk sold by a distributor. The local milk board, when set up, would be empowered to levy an additional sum not exceeding the maximum provided in the act to cover its own expenses. The terms of these sections of the act and of Regulation 6, it is urged, would require the dairy in Washington, if licensed as a distributor to handle milk for sale in Virginia, to pay an assessment not exceeding 2¢ per hundred pounds on all

milk sold by it to High in Washington and shipped by it in interstate commerce to his stores in Virginia. We need not stop to consider this point for as we have seen, the dairy is not required by the act to take a license.

However, it is also said that even if the dairy be not licensed as a distributor, nevertheless the assessment would [fol. 130] bear upon interstate commerce, because High, purchasing all of the milk sold by him in Virginia from the dairy, would be required to pay an assessment thereon of not more than 2¢ per hundred pounds, an assessment he would not have to pay under Regulation 6 if he purchased his milk from a Virginia distributor. Under the law, High would not pay an assessment on milk purchased by him from a licensed distributor in Virginia, because the assessment would have already been paid by the latter; but if High should buy from a producer in Virginia, he would pay for the use of the Milk Commission 1¢ per hundred pounds, and the remainder of the assessment would be deducted from the price paid the producer. Even so, it is difficult to understand how interstate commerce would be burdened or interfered with as a practical matter. Obviously, the sales by the dairy to High in Washington, and the subsequent interstate shipment of the goods would not be curtailed if the dairy, not being subject to Virginia price regulation, could continue to sell cultured whole milk at its wholesale price of 6¢ per quart as against 11¢ which a Virginia distributor would be required to charge. The assessment of 2¢ per hundred pounds paid by High in Virginia would be exactly the same as that borne by milk produced and distributed in Virginia; and the imposition of the assessment puts the merchandise shipped from Washington on equality with all other merchandise in the state, and constitutes no hindrance to the introduction of the goods from Washington into the state for sale upon the basis of equal competition with the local product.

Furthermore, the assessment is levied upon the goods after they have reached their destination in Virginia and the state has acquired the power to impose a tax or assessment upon them to defray the expenses of the administration of the law. It is well established that there is no burden upon interstate commerce from the imposition of [fol. 131] a state tax upon goods which have come to rest in the state at the end of interstate transportation, provided

that the state law levies the same tax on all goods of the same sort without regard to their origin. The prohibition contained in Article 1, Section 10, Paragraph 2 of the Constitution forbidding a state to lay imposts or duties on imports or exports is not applicable to such a statute and the validity thereof must be determined by deciding whether it amounts to a regulation of interstate commerce in violation of Article I, Section 8, Paragraph 3 of the Constitution. In Sonneborn Bros. vs. Cureton, 262 U. S. 506, the Supreme Court was called upon to decide whether oil transported from New York to the warehouse of the taxpayer in Texas and there held for sale in Texas in original packages and subsequently sold in Texas in such packages, might be made the basis of an occupation tax based upon the gross amount of sales in the state, the tax applying to all wholesale dealers in oil engaged in making sales and delivery in Texas. The Court said (508):

"Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

The same doctrine was applied in Wiloil Corp. vs. Pennsylvania, 294 U. S. 169, 175, where it was said:

"Our decisions show that, if goods carried from one state have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction. Woodruff vs. Parham, 8 Wall. 123; Brown vs. Houston, 114 U. S. 622, 632; American Steel & Wire Co. vs. Speed, 192 U. S. 500, 519-522; Sonneborn Bros. vs. Cureton, 262 U. S. 506. And as that rule applies whether the burden falls directly or indirectly (Banker Bros. Co. vs. Pennsylvania, 222 U. S. 210) it is not material

whether the tax is upon the sale and delivery or upon the property."

We find no ground in this case for equitable relief, and [fol. 132] therefore the application for temporary restraining order, and for interlocutory and permanent injunctions will be denied, and the bill of complaint will be dismissed.

[fol. 133] IN UNITED STATES DISTRICT COURT

In Equity. No. 363

HIGHLAND FARMS DAIRY, INCORPORATED, a Corporation, and LUTHER W. HIGH, Complainants,

vs.

J. S. AGNEW, Chairman, and KONE BRUGH and T. R. SNAVELY, as Members of the Milk Commission of the Commonwealth of Virginia, Defendants

FINAL DECREE DENYING INTERLOCUTORY INJUNTION AND DISMISSING BILL OF COMPLAINT—Entered and Filed October 24, 1936

This cause came on to be heard at Alexandria, Virginia, on July 30, 1936, upon a stipulation of facts to which the parties had agreed, and was argued by counsel orally and by briefs then and subsequently submitted; and the court accepted the stipulation as its findings of fact, and having considered the questions involved has reached the conclusions of law, for the reasons stated in its opinion filed herein on October 3, 1936, that the Act of the General Assembly of Virginia establishing the Milk Commission of Virginia, which was attacked in this case, and the orders of the Milk Commission of Virginia passed pursuant to said Act, did not involve a violation of the Fourteenth Amendment to the Federal Constitution or of the like provisions of the Constitution of Virginia as a denial of the equal protection of the law or of due process of law.

It is Therefore Ordered, Adjudged and decreed this 24th day of October, 1936: That the prayers of the plaintiffs herein for an interlocutory injunction and for a final in-

junction be and the same are hereby denied; and that the bill of complaint of the plaintiffs herein be and the same is hereby dismissed, the plaintiffs to pay the costs of this suit.

It is further ordered, adjudged and decreed, that the operation of this decree shall be stayed for fifteen days from this date in order to allow the plaintiffs an opportu- [fol. 134] nity to perfect an appeal to the Supreme Court of the United States.

(Sgd.) Morris A. Soper, United States Circuit Judge. (Sgd.) Luther B. Way, United States District Judge. (Sgd.) Robt. N. Pollard, United States District Judge.

[fol. 135] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 6, 1936

To J. S. Agnew, Chairman, and Kone Brugh and T. R. Snaveley, as the Members of the Milk Commission of the Commonwealth of Virginia:

Please Take Notice that pursuant to the statutes and rules of Court in such case made and provided, Highland Farms Dairy, Incorporated, and Luther W. High, the plaintiffs in the above-entitled cause, and each of them, have appealed and do hereby appeal to the Supreme Court of the United States from the final decree of the above-entitled Court heretofore made herein and entered on the 24th day of October, 1936, and from each and every part thereof.

(Sgd.) E. Randolph Williams, T. Justin Moore, Philip Rosenfeld, Counsel for Plaintiffs.

November 4, 1936.

Service of the within notice of appeal and the receipt of a copy thereof is hereby acknowledged this 4th day of November, 1936.

(Sgd.) Edwin H. Gibson, Assistant Atty. General of Counsel for State Milk Commission.

[fol. 136] IN UNITED STATES DISTRICT COURT

Petition for Appeal by Highland Farms Dairy, Incorporated, and Luther W. High, Plaintiffs—Filed November 6, 1936

The Highland Farms Dairy, Incorporated, and Luther W. High, the plaintiffs, being aggrieved by the final order or decree of the above-entitled Court heretofore made and entered on the 24th day of October, 1936, in the above-entitled cause, wherein, among other things, the said Court composed of the Honorable Morris A. Soper, United States Circuit Judge, the Honorable Luther B. Way, United States District Judge, and the Honorable Robert N. Pollard, United States District Judge, refused, after notice and hearing, to grant an interlocutory injunction and a permanent injunction, application for which was made pursuant to Section 266 of the Judicial Code, and dismissed the bill of complaint herein filed, do pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in Assignment of Errors as follows:

ASSIGNMENT OF ERRORS

The appellants assign the following errors on which they will rely on appeal to the Supreme Court of the United States from the decree made by this Court on the 24th day of October, 1936:

1. The District Court erred in holding that the Act of the General Assembly of Virginia, known as the Milk and Cream Act, approved March 20, 1934, was a proper exercise of the police power of the State.

2. The District Court erred in failing to hold that the [fol. 137] said Act was invalid as an improper delegation of legislative power to the Milk Commission.

3. The District Court erred in not holding that the powers conferred upon the Commission involved a denial of equal protection of the laws and a denial of due process in contravention of the 14th Amendment to the Constitution of the United States.

4. The District Court erred in not holding that the acts and regulations adopted by the Milk Commission were in-

valid because they constituted an interference on the part of the State with interstate commerce.

5. The District Court erred in not holding that the act of the Milk Commission in establishing a market, fixing minimum prices and adopting rules and regulations constituted a denial of due process because of procedural errors on the part of the Commission in not providing for a hearing in accordance with said Act.

PRAYER FOR REVERSAL

Wherefore, appellants pray that the decree denying their application for an interlocutory injunction and a final injunction and dismissing their bill of complaint be reversed and that the Statutory Court may be directed to reinstate the bill and grant the application for injunction therein prayed for.

Appellants further pray that citation be issued as provided by law and that a transcript of the record, proceedings and documents on which the final decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Appellants further pray that the defendants herein may be enjoined and restrained from enforcing or attempting to enforce against them the provisions of an Act of the [fol. 138] General Assembly entitled "An act to provide for the supervision, regulation and control of the production, processing, transportation, storage, distribution and sale of milk and cream; to create a Milk Commission and local milk boards and to define and provide for the functions, duties and powers thereof"; approved March 20, 1934; and from enforcing or exercising their powers as members of the Milk Commission of the Commonwealth of Virginia in the Arlington-Alexandria Milk Market, until their appeal shall have been fully heard and determined.

Appellants further pray that a proper order be made relating to the security to be required of them.

(Sgd.) E. Randolph Williams, T. Justin Moore, Philip Rosenfeld, Counsel for Plaintiffs.

[fol. 139] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered and Filed November 6, 1936

The plaintiffs in the above-entitled cause having prayed for the allowance of an appeal in the above-entitled case to the Supreme Court of the United States from the decree made and entered in the above-entitled suit by the above-entitled Court on the 24th day of October, 1936, and from each and every part thereof, and having presented and filed their assignment of errors and statements as to jurisdiction pursuant to the statutes and rules of Court in such cases made and provided,

It Is Ordered and Decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within 30 days from the date thereof, and the Clerk is directed to transmit to the Supreme Court of the United States a properly authenticated transcript of the record, proceedings and papers on which the decree was made and entered; and

It Is Further Ordered that security for costs on appeal be fixed in the sum of $1000.00.

(Sgd.) Robert N. Pollard, United States District Judge.

Dated November 6, 1936.

[fols. 140-144] Bond on appeal for $1,000.00, approved and filed November 16, 1936, omitted in printing.

[fol. 145] IN UNITED STATES DISTRICT COURT

APPLICATION OF PLAINTIFFS FOR STAY PENDING APPEAL—Filed November 19, 1936

To the Honorable Morris A. Soper, United States Circuit Judge; Honorable Luther B. Way, United States District Judge; Honorable Robert N. Pollard, United States District Judge:

Now come Highland Farms Dairy, Incorporated, and Luther W. High, the plaintiffs in the above-entitled cause, and represent to the Court as follows:

1. Plaintiffs, contemporaneously with the filing hereof, are filing in this Court, together with necessary supporting

papers, their petition for appeal to the Supreme Court of the United States from the final decree entered herein on October 24th, 1936, dismissing the bill of complaint herein brought to enjoin enforcement against the plaintiffs by the defendants of the Act of the General Assembly of the Commonwealth of Virginia known as the Milk and Cream Act, approved March 29, 1934, and the rules and regulations prescribed by the Milk Commission made thereunder.

2. Soon after the handing down of the decision in this cause, to-wit, on the 17th day of October, 1936, the defendants filed a bill or petition in the Law and Equity Court of the City of Richmond seeking an order directing the plaintiff, Luther W. High, to comply with the rules and regulations prescribed by said Milk Commission, the enforcement of which was sought to be enjoined in this cause and thereupon, without notice to the plaintiffs, or either of them, an injunction order was entered, a copy of which is herewith filed as a part of this petition. Thereafter, to-wit, on the 24th day of October, 1936, said injunction order was annulled, it having been understood and agreed that pending the decision of this Court upon the application for an inter- [fol. 146] locutory injunction and permanent injunction, no action would be taken by said defendants. Through a misunderstanding and lack of knowledge of the then representative of the defendants, the aforesaid injunction was applied for and issued. The said suit in the Law & Equity Court instituted by the said defendants against Luther W. High and others is still pending and it is believed that unless and until this Court enter its order herein staying and suspending, pending determination of appeal to the Supreme Court of the United States, the said defendants will by the prosecution of the suit, as aforesaid, or otherwise, in the attempted enforcement of penalties against Luther W. High, undertake the complete enforcement of the said Milk and Cream Act and the rules and regulations adopted pursuant thereto which will result in the destruction of the business of the said Luther W. High, as further fully set forth in the bill of complaint filed in this cause.

3. The issues involved in this cause involve important and far-reaching constitutional questions which should be submitted to and finally settled by the Supreme Court of the United States.

4. This Court has the authority to grant the stay herein prayed. Virginian Railroad Co. v. United States, 272 U. S. 658, 668, 675; Beaumont S. L. & W. R. R. Co. v. United States, 282 U. S. 74, 91, 92.

Wherefore, in view of the foregoing consideration and the importance of the questions presented and in order to fully protect their right of appeal, the plaintiffs respectfully pray that this Court enter its order herein staying and suspending, pending determination of appeal to the Supreme Court, the enforcement by the defendants of the said Milk Act and the rules and regulations made pursuant thereto, so far as the same shall affect the plaintiffs or either of them.

[fol. 147] (Sgd.) E. Randolph Williams, T. Justin Moore, Philip Rosenfeld, Counsel for Plaintiffs.

[fol. 148] VIRGINIA:

IN THE LAW AND EQUITY COURT, PART TWO, OF THE CITY OF RICHMOND

STATE MILK COMMISSION

v.

LUTHER W. HIGH, Trading as High's; K. A. WEBB, (MRS.) E. HOLLIDAY, (MRS.) L. HENDERSON and (MRS.) C. POWELL

DECREE

This day came the plaintiff, by the Attorney General of Virginia, and presented its bill duly verified by affidavit, and, by leave of court, filed its bill of complaint; whereupon, in accordance with the prayer of the bill, an injunction is awarded the plaintiff, enjoining and restraining the defendants, their agents, servants and employees, from selling milk, containing 3.25-4.1% butterfat, or a higher percentage of butterfat, at less than thirteen cents per quart retail at the places of business of the said Luther W. High within the Arlington-Alexandria milk market area, as provided in Regulation No. 4, subsection (a), of the rules and regulations adopted by the State Milk Commission for the supervision and control of the Arlington-Alexandria milk market.

It is further ordered that an injunction is awarded the plaintiff, enjoining and restraining the defendants, their agents, servants and employees, from distributing milk or cream in the said Arlington-Alexandria milk market area unless and until they shall have made the applications for licenses required by section 5 of chapter 357, Acts of 1934.

This injunction, unless sooner enlarged or dissolved, shall remain in force until December 1st, 1936. The plaintiff [fol. 149] being a public governmental agency, no bond is required of it.

[fols. 150-151] Citation, in usual form, showing service on Edwin H. Gibson et al., filed November 16, 1936, omitted in printing.

[fol. 152] IN UNITED STATES DISTRICT COURT

ORDER ON APPLICATION FOR STAY—Entered and Filed November 19, 1936

This day came the plaintiffs and filed their application for stay pending appeal.

And counsel for the defendants having stated in open court that no attempt will be made by the defendants to enforce in the Alexandria-Arlington Market the provisions of the Milk and Cream Act of the Commonwealth of Virginia and the rules and regulations made by the Milk Commission pursuant thereto until this appeal shall have been finally heard and determined;

It is Adudged, Ordered and Decreed that plaintiffs' application for injunction pending such appeal be, and the same hereby is, denied.

(Sgd.) Morris A. Soper, United States Circuit Judge.
(Sgd.) Luther B. Way, United States District Judge. (Sgd.) Robt. N. Pollard, United States District Judge.

Dated Nov. 19, 1936.

[fol. 153] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed November 21, 1936

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the Office of the Clerk of the Supreme Court of the United States for use on appeal to the Supreme Court of the United States, and you will please incorporate in such transcript the following portions of the record in this cause:

1. Amended bill of complaint and exhibits filed therewith.
2. Motion for temporary restraining order.
3. Order filing amended bill of complaint and convening court.
4. Stipulation of facts and exhibits therewith.
5. Affidavit of Philip Rosenfeld and exhibits therewith.
6. Joint and separate answer of J. S. Agnew, Chairman, and Kone Brugh and T. R. Snavely, as members of the Milk Commission of the Commonwealth of Virginia.
7. Amended answer and motion to dismiss of defendants.
8. Order filing amended answer.
9. Order of the 29th day of May, 1936, refusing temporary restraining order and continuing application for an interlocutory injunction.
10. Opinion of the Court rendered October 3, 1936, and final decree dismissing bill of complaint, October 24, 1936.
11. Notice of appeal directed to the defendants with acknowledgment of service thereof by the Attorney General.
12. Petition for appeal.

[fol. 154] 13. Order allowing appeal.

14. Application of plaintiffs for stay pending appeal.
15. Notice of filing application of plaintiffs for stay pending appeal, with acknowledgment of service by the Attorney General.
16. Order denying application for injunction pending appeal and noting stipulation of defendants that no attempt will be made pending appeal to enforce in the Alexandria-Arlington Market the Milk and Cream Act.
17. Præcipe for transcript of the record.

18. Clerk's certificate of transcript of record, said transcript to be prepared as required by law and the rules of the Supreme Court of the United States, and to be filed in the Office of the Clerk of the Supreme Court of the United States, in Washington, on or before the 6th day of December, 1936.

Dated this 16th day of November, 1936.

(Sgd.) E. Randolph Williams, T. Justin Moore, Philip Rosenfeld.

Service of the above præcipe accepted and acknowledged this 16th day of November, 1936.

(Sgd.) Abram P. Staples, Attorney General of Virginia and Counsel of record for Appellees. (Sgd.) Edwin H. Gibson, Of Counsel for Appellees.

[fols. 155-157] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed November 21, 1936

It is hereby stipulated by and between counsel for appellants and appellees that the Clerk of the District Court of the United States for the Eastern District of Virginia shall include in the transcript of record to be filed in the Supreme Court of the United States all those parts of the record and only those parts designated in the præcipe of the appellants filed and served herein.

Dated this 16th day of November, 1936.

(Sgd.) E. Randolph Williams, T. Justin Moore, Philip Rosenfeld, Counsel for Appellants. (Sgd.) Edwin H. Gibson, Counsel for Appellees.

[fol. 158] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME WITHIN WHICH TRANSCRIPT OF RECORD ON APPEAL MAY BE FILED—Entered and Filed December 2, 1936

Good cause appearing therefor, it is hereby ordered that the plaintiffs in the above-entitled cause may have, and

they are hereby allowed to and including December 15, 1936, within which to docket, and for the Clerk of this Court to transmit to the Clerk of the Supreme Court of the United States, a properly authenticated transcript of the record, proceedings and papers on which the decree was made and entered.

(Sgd.) Robt. N. Pollard, United States District Judge.

Dated December 2, 1936.

[fol. 159] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 160] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED ON AND OF PARTS OF THE RECORD NECESSARY TO THE CONSIDERATION THEREOF—Filed December 17, 1936

Appellants, both in brief and on oral argument, will rely upon each of the points raised specifically in their assignments of error filed herein, which said points are as follows:

Point I

That the District Court erred in holding that the Act of the General Assembly of Virginia known as the Milk and Cream Act, approved March 29, 1934, was a proper exercise of the police power of the State. The existence of an emergency, upon which the price-fixing power is based, is not determined by the legislative body but the determination is delegated to an administrative agency.

Point II

That the District Court erred in failing to hold that said Milk and Cream Act was invalid as an improper delegation of legislative power to the Milk Commission. The legislative power of the sovereign state is, under the Constitution of Virginia, vested solely in the General Assembly, but the

Act complained of attempts to confer the legislative power of price-fixing and the determination of who may or may not engaged in the private business of producing and distributing milk is left to an administrative body with no measure or standard or principles fixed by which the administrative body is to be guided.

Point III

That the District Court erred in not holding that the powers conferred upon the Commission involved a denial of equal protection of the law and a denial of due process in contravention of the Fourteenth Amendment to the Constitution of the United States.

Point IV

That the District Court erred in not holding that the acts [fol. 161] and regulations adopted by the Milk Commission, pursuant to said Milk and Cream Act, were invalid because they constitute an interference on the part of the State with interstate commerce and in violation of Section 8, and Section 10, of Article I of the Constitution of the United States.

Point V

That the District Court erred in not holding that the Act, in establishing a market fixing minimum prices and adopting rules and regulations constitute a denial of due process of law because of procedural errors on the part of the Commission in not providing for a hearing in accordance with said Act.

The appellants respectfully represent that the whole of the record as filed is necessary for the consideration of the above-mentioned points.

(Sgd.) E. Randolph Williams, T. Justin Moore, Philip Rosenfeld, Counsel for Appellants.

Legal and timely service of the foregoing statement of the points to be relied on by appellants and of the parts of the record which they think necessary for the consideration thereof, pursuant to Rule 13, Paragraph 9, is hereby accepted and receipt of a copy thereof is hereby acknowledged for and on behalf of J. S. Agnew, Chairman, and Kone

Brugh and T. R. Snavely, as members of the Milk Commission of the Commonwealth of Virginia.

(Sgd.) Edwin H. Gibson, Counsel of Record for Appellees.

[fol. 162] [File endorsement omitted.]

Endorsed on cover: File No. 41,113. E. Virginia, D. C. U. S., Term No. 573. Highland Farms Dairy, Incorporated, and Luther W. High, appellants, vs. J. P. Agnew, Chairman, Kone Brugh, and T. R. Snavely, as Members of the Milk Commission of the Commonwealth of Virginia. Filed December 17, 1936. Term No. 573, O. T., 1936.

FILED
DEC 17 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 573

HIGHLAND FARMS DAIRY, INCORPORATED, AND LUTHER W. HIGH,

Appellants,

vs.

J. S. AGNEW, CHAIRMAN; KONE BRUGH, AND T. R. SNAVELY, AS MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

STATEMENT AS TO JURISDICTION.

E. RANDOLPH WILLIAMS,
T. JUSTIN MOORE,
PHILIP W. ROSENFELD,
Counsel for Appellants.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the order in question	2
The statutory provision believed to sustain the jurisdiction	2
The statute of the State of Virginia, the validity of which is involved	2
Date of judgment sought to be reviewed and of application for appeal	3
Nature of the case and the ruling of the court bringing the case within the jurisdiction of provisions relied on	3
Grounds upon which it is contended the questions involved are substantial	6
A—The appellants contend that the District Court erred in holding that the Act of the General Assembly of Virginia, known as the Milk and Cream Act, was a proper exercise of the police power of the State	6
B—It is contended that the District Court erred in failing to hold that the Virginia Milk Act was invalid as an improper delegation of legislative power to the Milk Commission and in not holding that the powers conferred upon the Commission involved a denial of equal protection of the laws and a denial of due process in contravention of the Fourteenth Amendment to the Constitution of the United States	14

Page

C—It is contended that the District Court erred in not holding that the Milk and Cream Act and the Rules and Regulations adopted by the Milk Commission were invalid because they constituted an interference on the part of the State with interstate commerce 20

Cases believed to sustain jurisdiction 23

Exhibit "A"—Milk and Cream Act of the State of Virginia and Rules and Regulations promulgated by the State Milk Commission 25

Exhibit "B"—Opinion of the District Court of the United States for the Eastern District of Virginia 49

TABLE OF CASES CITED.

Baldwin v. *Seelig*, 294 U. S. 511 ..... 22, 24
Barbier v. *Connolly*, 113 U. S. 27 ..... 17, 24
Block v. *Hirsh*, 256 U. S. 135 ..... 8, 23
Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194 ..... 7, 8, 23
Borden's Farm Products Co. v. *Ten Eyck*, 297 U. S. 251 ..... 7, 23
Eubank v. *City of Richmond*, 226 U. S. 137 ..... 17, 24
Fairmount Creamery Co. v. *Minnesota*, 274 U. S. 1 ..... 7, 23
Lehman v. *State Board of Public Accountancy*, 263 U. S. 394 18
Lieberman v. *Van Der Carr*, 199 U. S. 552 18
Morehead v. *New York*, 80 L. Ed. 921 ..... 9, 13, 23
Mutual Film Corporation v. *Ohio Industrial Commission*, 236 U. S. 230 ..... 17, 24
Nebbia v. *New York*, 262 N. Y. 259; 291 U. S. 502 ..... 6, 8
New State Ice Company v. *Liebmann*, 285 U. S. 262 ..... 7, 8, 23
Panama Refining Co. v. *Ryan*, 293 U. S. 388 ..... 17, 19, 20, 24
Reynolds v. *Milk Commission of Virginia*, 163 Va. 957 ..... 7, 10
Schechter Corporation v. *United States*, 295 U. S. 495 ..... 17, 19, 24
Smith v. *Cahoon*, 283 U. S. 553 19

Page

Taylor v. *Smith*, 140 Va. 217 ... 17, 24
Thompson v. *Smith*, 155 Va. 367 ... 17, 24
Tyson v. *Banton*, 273 U. S. 418 ... 7, 23
Webster v. *Fall*, 266 U. S. 507 ... 11
Wichita Railway & Light Co. v. *Public Utilities Commission*, 260 U. S. 48 ... 17, 20, 24
Williams v. *Standard Oil Co.*, 278 U. S. 235 ... 7, 23
Wolf Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522 ... 7, 23
Worthen Co. v. *Thomas*, 292 U. S. 426 ... 13
Yick Wo v. *Hopkins*, 118 U. S. 366 ... 17, 24

STATUTES CITED.

Act of the General Assembly of Virginia, approved March 29, 1934, Official Volume, Acts of General Assembly of Virginia, 1934, Chapter 357, page 558, Section 1 (II) ... 20
3(i) ... 4, 11
3(j) ... 14
3(k) ... 15
4 ... 15, 21
4(o) ... 21
5 ... 15
7 ... 21
11(b) ... 22
14 ... 22
17 ... 4, 13
Constitution of the United States, Article I, Section 8 ... 22
14th Amendment ... 11
Constitution of Virginia, Article IV, Section 40 ... 5
Judicial Code, Section 266, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 380) ... 2, 5, 6
New York Milk Control Law, Section 308, subdivision 2 ... 16
New York Milk Control Law, Section 308, subdivision 3 ... 16
New York Milk Control Law, Section 308, subdivision 3 (a to k) ... 16
Regulation No. 6 of the State Milk Commission of the State of Virginia ... 22

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 573

HIGHLAND FARMS DAIRY. INCORPORATED, AND LUTHER W. HIGH,

Appellants,

vs.

J. S. AGNEW, CHAIRMAN; KONE BRUGH, AND T. R. SNAVELY, AS MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

JURISDICTIONAL STATEMENT OF APPELLANTS

The Highland Farms Dairy, Incorporated, a corporation, and Luther W. High, appellants, applicants herein for an appeal to the Supreme Court of the United States from the order of the District Court of the United States for the Eastern District of Virginia dated and filed on the 24th day of October, 1936, in accordance with the requirements of

Rule 12, Paragraph 1 of Rules of the Supreme Court of the United States (as amended March 2, 1936), herewith present this separate typewritten statement as to the jurisdiction of the Supreme Court of the United States.

I.

Basis Upon Which it is Contended that the Supreme Court of the United States Has Jurisdiction Upon Appeal to Review the Order in Question.

The order of the District Court of the United States for the Eastern District of Virginia, dated and filed on the 24th day of October, 1936, herein, is a final order in a suit in which the appellants sought a permanent injunction restraining the enforcement, operation and execution of a statute of the State of Virginia and certain rules and regulations made pursuant thereto on the ground that they were repugnant to the Constitution of the United States.

II.

The Statutory Provision Believed to Sustain the Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the order in question is Section 266 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, United States Code Annotated, Title 28, Section 380.

III.

The Statute of the State of Virginia, the Validity of Which is Involved.

The statute of Virginia, the validity of which is involved, is an act of the General Assembly of Virginia, approved March 29, 1934, Official Volume, Acts of General Assembly

of Virginia, 1934, Chapter 357, page 558. The complete statute and the rules and regulations adopted pursuant thereto are attached hereto as Appendix A.

IV.

Date of Judgment Sought to be Reviewed and of Application for Appeal.

The order of the District Court of the United States for the Eastern District of Virginia sought to be reviewed was dated October 24, 1936.

The application for appeal was presented on the 6th of November, 1936.

V.

Nature of the Case and the Ruling of the Court Bringing the Case Within the Jurisdiction of Provisions Relied on.

Highland Farms Dairy, Incorporated, a corporation, operates a milk depot or creamery in the City of Washington, purchasing milk therefor from producers in the District of Columbia, State of Maryland and State of Virginia, and sells its entire output of bottled milk to the appellant, Luther W. High, sales being made in the City of Washington. The individual appellant, Luther W. High, is engaged in the business of operating retail stores for the sale and distribution of milk acquired from the corporate appellant.

The statute above referred to, which we may hereafter refer to as the Milk Act, while containing in the preamble thereof declarations of the existence of emergency conditions in the production, distribution and sale of milk requiring supervision and control in the exercise of the police powers of the State, was not made effective by the Act at any time or place within the State, but where and when the

authority and control provided for in the Act is to be exercised shall be determined by a Milk Commission created by said Act. While the Legislature declared an emergency it left to the Milk Commission the right to really determine whether there was an emergency and where in the State it would be found to exist.

The purpose of the Act is to provide for regulation of the prices of milk. While it is stated in the preamble, in support of the police powers and regulation, that the Act is "to promote the public welfare, public health and public peace," a consideration of the then existing law and provisions of this enactment clearly indicate that the objective was economic and an effort to control prices in the supposed interest of the producers. The statute complained of is not an act of the legislative body determining the existence of an emergency, but is a delegation of the authority to a Milk Commission to determine where, when, if at all, an emergency exists. After establishing areas, prices and regulations, pursuant to such authority, there is the further delegation of power to determine an emergency in the right given a majority of the producers and distributors (in volume of milk) to themselves to require the complete annulment with respect to any area established (Subdivision i, Section 3 of the Act).. The Act fixes no definite time for the termination of the Act but the legislative body provided an *utterly unnecessary provision that* by joint resolution the legislative body might designate the termination, and then made an extraordinary delegation of legislative authority to the Governor to terminate the same by proclamation, regardless of any conditions (Section 17 of the Act).

To the Milk Commission the Act gives power, without fixing any standard whatever, to determine who may have or who may not have license to produce and distribute milk in any territory, and after the grant of license, to suspend

or withdraw licenses theretofore granted. The Milk Act undertakes to control the purchase by distributors in the area to be defined by the Milk Commission from persons not licensed as required by the Act who may be beyond the State, and so interferes with interstate commerce.

Pursuant to the authority granted in said Act, the Milk Commission established the Arlington-Alexandria Milk Market area, prescribed minimum prices and certain rules and regulations relating to the production and distribution of milk in said milk market and sought to enforce the same against the appellants. The corporate appellant and the individual appellant thereupon filed their bill in the District Court of the United States for the Eastern District of Virginia asking relief from the enforcement of the said Act and the rules and regulations made pursuant thereto by the Milk Commission, on the ground of the unconstitutionality of said statute and the rules and regulations made pursuant thereto because said Act was in violation of the Fourteenth Amendment to the Constitution of the United State, in violation of Section 40 of Article IV of the Constitution of Virginia, and in violation of Article I, Section 8, of the Constitution of the United States, and on the further ground that the action of the Milk Commission in establishing the market area and fixing prices was not had pursuant to the requirements of the Act. The appellants in their bill asked for a temporary restraining order. The temporary restraining order was refused upon assurance from the defendants that no effort would be made to enforce the Act and the rules and regulations until the application for an interlocutory injunction could be heard. Whereupon, by order of the District Court of the United States for the Eastern District of Virginia, a hearing and determination of the application were directed to be had before a court consisting of three judges as provided in Section 266 of the Judicial Code, as amended (28 U. S. C. A.;

Section 380). Thereafter, the application for an interlocutory and final injunction came on to be heard upon agreement and upon stipulation of facts.

By the order of the 24th day of October, 1936, the injunction was refused and the bill dismissed.

VI.

Grounds Upon Which it is Contended the Questions Involved are Substantial.

A. The Appellants Contend that the District Court Erred in Holding that the Act of the General Assembly of Virginia, Known as the Milk and Cream Act, Was a Proper Exercise of the Police Power of the State.

In support of this claim it is contended:

First, that the General Assembly of Virginia was not authorized in the exercise of police power to regulate the price of milk except in the event of a recognized public emergency; and

Second, that while the legislative act involved in the preamble declared that an emergency existed calling for the exercise of the police power, the Act upon its face leaves entirely open the question of an emergency and delegates the determination of the existence of the emergency to an administrative board.

The decision of the District Court* was based upon the authority of the decision of the Supreme Court of the United States in *Nebbia* v. *New York*, 291 U. S. 502, in which the constitutionality of the New York Milk Act was involved,

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* Pursuant to the provisions of the Rules of this Court, Rule 12, Paragraph 1, Appellants append hereto, marked "Appendix B", a copy of the opinion rendered in the District Court.

and the decision of the Supreme Court of Appeals of Virginia in *Reynolds* v. *Milk Commission of Virginia*, 163 Va. 957, in which the constitutionality of the Virginia Milk and Cream Act was upheld by a divided court of four to three in support of the validity of the Act, after a rehearing upon the first decision in which the court stood five to one against the validity of the Act.

In view of the opinion of this Court in the *Nebbia* case and the subsequent decisions in *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, and *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, the right of a State legislative body to control and regulate the price of milk is dependent upon the existence of an emergency calling for the exercise of this extraordinary power. That Government regulation in the shape of price-fixing in private business as opposed to public utilities or monopolies can be justified only by the existence of emergency conditions has been established in the repeated decisions of this Court, as was said by the court in *Wolf Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailer, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation."

On the contrary, under normal conditions price-fixing of the products of private business, including milk, has been declared unconstitutional. *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Tyson et als.* v. *Banton*, 273 U. S. 418. And in *New State Ice Company* v. *Liebmann*, 285 U. S. 262, dealing with the attempt of a State to control the manufacture and sale of ice, this Court held that this business was private

and not affected with a public interest, and likened it to "the business • • • of the grocer, the *dairyman*, the butcher or the baker."

In the *Nebbia* case it seems clear from the opinion of Mr. Justice Roberts that only when the conditions or practices make "unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public or portend the destruction of the industry" then the State may regulate the prices to be charged for the products or commodities of the business subject to the police power.

As Mr. Justice Holmes said:

> "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." (*Block* v. *Hirsh*, 256 U. S. 135, 157.)

When the *Nebbia* case was before the Court of Appeals of New York, in *People* v. *Nebbia*, 262 N. Y. 259, that court distinguished *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, saying:

> "The New York law creates no monopoly; does not restrict production; was adopted to meet an emergency; milk is a greater family necessity than ice."

In *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, in considering the validity of a feature of the New York Act not dealt with in the *Nebbia* case, this Court recognized the peculiar conditions which justified the enactment of the New York Milk Act, and in *Borden's Farm Products Co.* v. *Ten Eyck*, 80 L. Ed. 469 (1936), after the hearing directed in *Borden's Farm Products Co.* v *Baldwin, supra*, in the light of conditions found by the trial court to exist in New York in 1934, the Supreme Court upheld the constitutionality of the differential permitted by

the New York Milk Control Act of 1933, but the court adverted to the price-fixing provisions as "a temporary expedient to redress an injurious economic condition" and referred to the decision in the *Nebbia* case, as follows (p. 473):

> "We have held that article (the Fourteenth Amendment) does not prevent the fixing of maximum and minimum prices for milk, in the circumstances existing in New York in 1933."

In the opinion of this Court holding the New York Minimum Wage Law violative of the due process clause of the *Fourteenth Amendment, Morehead* v. *New York,* 80 L. Ed. 921 (1936), the court said of the invalid statute, at p. 928:

> "The Act is not to meet an emergency, it discloses a permanent policy; * * *"

From these decisions of this Court, we submit that the right of the State to regulate and control the price of milk was upheld on the basis of the finding of fact which justified a regulation to meet an emergency.

The Supreme Court of Appeals of Virginia in *Reynolds* v. *Milk Commission, supra,* approved the Act as an emergency legislation declaring, at page 968, that it was not necessary for the court to apply the principle of regulation in its broadest aspect. Whether in the exercise of the police power, independent of special conditions which might be deemed an emergency, the State has the power to regulate the price of milk was not decided by the court in the *Nebbia* case nor was it decided by the Supreme Court of Appeals of Virginia in the *Reynolds* case, but in both opinions the question is left open.

The Virginia Milk and Cream Act, while its preamble declares an emergency, cannot be justified as emergency legislation because the Act upon its face in its express

provisions leaves entirely open the question of an emergency and delegates the determination of the existence of the emergency to an administrative board.

The Supreme Court of Appeals of Virginia in *Reynolds* v. *Milk Commission,* 163 Va. 957, in its final and divided opinion, reversing upon reargument its former opinion, relied upon the decision of this Court in the *Nebbia* case with a statement that the Virginia Milk and Cream Act was substantially like the New York Act which had been passed upon by this Court. The important differences apparently were not presented to the Court and were not considered. The question of whether the General Assembly of Virginia had in fact delegated the power to a Commission to determine the existence of an emergency was not considered and, apparently, not presented to the Court. The litigation in which that decision was made was brought by the Milk Commission and the parties now before the court in this proceeding were not parties in the case before the Supreme Court of Appeals of Virginia. This Court is not bound by the interpretation of the Court of Appeals of Virginia of the Act in matters which were not decided by that Court. The learned Judge of the District Court was in error in declaring his acceptance of the construction of the Supreme Court of Appeals of Virginia as to the provisions dealing with the delegation of the power to determine an emergency because that Court did not make any declaration of the construction as to these provisions and because the issue was not presented to the Court or considered by it.

The decision of the Supreme Court of Appeals of Virginia in *Reynolds* v. *Milk Commission, supra,* is not conclusive either of the sufficiency of the legislative declaration or the validity of the law enacted to meet such an emergency as was declared, first, because neither the legislative decla-

ration or the sufficiency thereof, nor the delegation to the Milk Commission to determine in fact the existence of the emergency, was challenged in that case; and secondly, because the decisions of the State court are not conclusive upon the question of the constitutionality of State legislation under the Federal Constitution. While the question of the right of the General Assembly of Virginia to delegate to the Commission the power to determine where and when the emergency, if any, exists and the remedy which should be applied, might have been raised, they were not raised and disposed of. And, as Mr. Justice Sutherland said, in *Webster* v. *Fall*, 266 U. S. 507, page 511:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

It is, therefore, submitted that the substantial question exists and is here presented as to whether the Virginia Milk and Cream Act violates the Fourteenth Amendment of the Constitution.

While the General Assembly of Virginia, in the preamble of the Act referred to, declares the existence of conditions justifying the extraordinary exercise of the police power, when the Act is considered its express provisions show that in point of time and place the duty to determine the existence of an emergency is in fact left to the Milk Commission. Under Subdivision (i) of Section 3, the creation of a market, whether there shall be any market area and any regulation at any time or place, are left to the Milk Commission. The second paragraph in this Subdivision (i) of Section 3 provides that the Commission may withdraw the exercise of its powers from any market at any time and place, and the last paragraph of Subdivision (i) of this Section leaves the determination of the exercise of this emergency power to

the will of a majority of the producers and distributors, measured by volume of milk, in any market established. Under the Virginia Milk and Cream Act no regulation is fixed as to time or place within the State but the entire matter of whether the Act should be made effective is to be determined at any time and in any area within the State as the Milk Commission may declare; and if and where a market area is established the continuance of the area and the regulation provided is left entirely to a majority of the producers and distributors (in quantity of milk). Under this latter provision there is presented the full opportunity for the creation of an uncontrolled monopoly. Two parties, as appears from the record in this case, parties who are producers and distributors in the area established, could by virtue of their production and distribution of the majority of milk handled in the area, make an end of any regulation. Such provisions for the delegation of the determination of the question of emergency were not present in the New York Milk Control Act, nor in any other State act so far as we have been able to discover. The authority of the legislative body to delegate the determination of the existence of the emergency to a Commission was not therefore before this Court in the *Nebbia* case in dealing with the New York Milk Control Act, and these defects in the Virginia Act were not dealt with in the opinion of the Supreme Court of Appeals of Virginia.

No area of emergency is defined in the Virginia Milk and Cream Act, nor is there any mandate to the Commission to define such area or to exercise its powers in any area of its determination, but such authority is permissive only and, as has been pointed out, limited upon the will of a majority of producers and distributors in quantity of milk in any given area whose opposition to the regulations of the Com-

mission is made final, irrespective of any emergency or regardless of the relief of conditions of the nature proclaimed by the General Assembly of Virginia.

Finally, the Act bears no definite time limit. Section 17 provides that the period of public emergency shall continue at the fancy of the State "until such date as the Legislature by joint resolution may designate to be the termination thereof" or "the date so designated by a proclamation of the Governor." The Virginia Milk and Cream Act alone, among the several state milk control acts which have been considered by the courts, fails to specify a definite period of emergency. Wholly unlike the New York Milk Control Act in this respect, the Virginia Act manifests a permanent policy in the same fashion as the New York Minimum Wage Law which was held unconstitutional in *Morehead* v. *New York*, 80 L. Ed. 921 (1936), subsequent to the *Nebbia* case.

The termination by proclamation of the Governor is a wholly unwarranted delegation of legislative authority. There is no fact to be found, condition to be determined as a precedent to the Act of the Governor, but it is left entirely in his power to annul this Act of the General Assembly. The Act clearly comes within the condemnation declared in *Worthen Co.* v. *Thomas*, 292 U. S. 426, dealing with the statute of the State of Arkansas, when it declared:

> "The legislature sought to justify the exemption by reference to the emergency which was found to exist. But the legislation was not limited to the emergency and set up no conditions apposite to emergency relief. • • • the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation, as here applied, to be a clear violation of the constitutional restriction."

B. It is Contended that the District Court Erred in Failing to Hold that the Virginia Milk Act was Invalid as an Improper Delegation of Legislative Power to the Milk Commission and in not Holding that the Powers Conferred Upon the Commission Involved a Denial of Equal Protection of the Laws and a Denial of Due Process in Contravention of the Fourteenth Amendment to the Constitution of the United States.

In support of this contention the appellants say that the Virginia Milk Act is defective in the delegation of authority to fix prices without any fixed standard or measure being prescribed. As declared by the Court of Appeals of Virginia, and abundantly appears upon the fact of the Act, the statute is essentially an economic measure looking to the control of prices as the essential consideration. As a necessary incident to this it undertakes to control all parties who may engage in the business by requiring the parties, producers or distributors, to secure a license from the Milk Commission. The absence of any standard for the establishment of the markets, the price-fixing, issuance and revocation, suspension or refusal of license, condemns the whole act. Without the provision for control through price-fixing, and without the provision for regulation of the parties in the business by issuance, refusal, suspension or withdrawal of licenses, the Act becomes a mere shell. In its aspects, both as to price-fixing and issuance of licenses, the Virginia Milk Act is not substantially the same as the New York Milk Act dealt with in the *Nebbia* case, but is different in essential provisions. While in the Virginia Milk Act the Commission is authorized to inquire into the various matters and is given a wide scope in investigation, the only suggestion of limitation is in Subdivision (j) of Section 2 of the Act, as follows:

> "In determining the reasonableness of prices to be paid or charged in any market or markets for any

> grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage, and delivery charges, the prices of other foods, and the welfare of the general public."

There is not, as in the New York Act, the provision that "the board shall take into consideration all conditions affecting the milk industry, including the *amount necessary to yield a reasonable return* to the producer and to the Milk dealer."

The Virginia Milk Act has clearly omitted an essential element in the fixing of prices for service or commodities. The learned Judge of the lower court was in error in his suggestion that this was provided for in the Virginia Milk Act.

Again, the Virginia Milk Act is not substantially the same but differs from the New York Act in essential particulars in regard to the issuance, suspension and revocation of licenses. Section 4 of Article II of the Act provides that no distributor shall buy or sell milk unless such distributor is duly licensed, and that it shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed, while Subdivision (k) of Section 3 of Article II provides:

> "The Commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing."

Section 5 provides that the application for a license to operate may be by mail or otherwise, but there is absolutely no statement as to what the conditions are upon which the license should be issued or refused, or when issued be revoked.

On the other hand, in the New York Act, Subdivision 2, Section 308, there is full and explicit statement of the conditions to be complied with by the applicant for a license, concluding with the express declaration:

> "A license shall be granted to the applicant by the board subject to the provisions of this article."

Then follows Subdivision 3 of this Section 308 which prescribes that the "board may decline to grant a license or may suspend or revoke a license already granted upon due notice and opportunity of hearing to the applicant or licensee when satisfied of the existence of any of the following." Then follow paragraphs, from (a) to (k) inclusive, setting forth explicitly the conditions which shall guide the board in refusing or suspending or revoking a license.

The Court of Appeals of Virginia in its divided opinion, 163 Va. 957, said (p. 977):

> "The license provision of the Virginia Act is not challenged in this proceeding. However the Act provides that refusal or revocation of the license may be reviewed by this court."

The original opinion, which was overruled on rehearing but which became the dissenting opinion of the three judges, did, however, expressly condemn the Act because of the grant of this arbitrary power to the Milk Commission as an improper delegation of legislative power and substituting government by men rather than by law. In the opinion of the learned Judge of the District Court this contention is disposed of by an interpretation of the Virginia Act as meaning that the power is not to be exercised arbitrarily or capriciously.

That the delegation of legislative function to an administrative body to regulate prices without fixing a standard or measure by which the board is to be guided is improper

may not be questioned. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter Corporation* v. *United States*, 295 U. S. 495. That a law which undertakes to vest in an administrative board arbitrary discretion with regard to an ordinary lawful business without prescribing a uniform rule of action is unconstitutional has been settled by this Court. *Yick Wo* v. *Hopkins*, 118 U. S. 366; *Barbier* v. *Connolly*, 113 U. S. 27; *Wichita Railway & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59; *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, 245; *Eubank* v. *City of Richmond*, 226 U. S. 137.

This rule is well settled in Virginia as will appear from the decisions of the Supreme Court of Appeals of Virginia as follows: *Thompson* v. *Smith*, 155 Va. 367, 379; *Taylor* v. *Smith*, 140 Va. 217. The final opinion in *Reynolds* v. *Milk Commission, supra*, makes no reference to these decisions, while the dissenting opinion relies upon them.

In the opinion of the learned Judge of the District Court, upon which the order complained of here rests, acceptance of and reliance upon the decision of this Court in the *Nebbia* case followed a like acceptance by the Supreme Court of Appeals of Virginia upon the view that the New York Act and the Virginia Act were substantially the same. In the opinion of the Court of Appeals of Virginia the essential differences, to which attention is here directed, were not considered. In the opinion in the District Court, upon which the order complained of is based, there is no consideration of the essential difference with respect to measure or standard of price-fixing, in the New York Milk Act and the Virginia Milk Act. The learned Judge, while recognizing that no other Milk Control Act contains conditions of "like breadth", disposes of the contention with respect to the unlimited grant of power, in the issuance or withdrawal of licenses, by declaring in effect that the words of

the Act are not to be accepted but are to be interpreted, though no interpretation is necessary. The opinion recognizes that such a grant of power in the terms of the Act would be invalid and the attempt to exercise the arbitrary power would be restrained by a court of equity as a violation of the due process clause of the Fourteenth Amendment. He suggests, to meet this situation, that it is not to be assumed that the Legislature granted arbitrary power but there is no room for interpretation. The General Assembly of Virginia did grant the power in unlimited and unrestricted terms.

The decision of the learned Judge of the District Court as to the validity of the unlimited control as to the issuance and suspension or revocation of license to conduct the milk business rests upon the decision of this Court in *Lieberman* v. *Van Der Carr*, 199 U. S. 552, in which was involved the validity of the provision in the Sanitary Code prohibiting the sale of milk without a permit "in writing from the Board of Health and subject to the conditions thereof." The Court of Appeals of New York sustained the provision as a grant of power to issue or withhold permits in the honest exercise of a reasonable discretion. The provision of the Sanitary Code was strictly a health measure and the discretion was clearly limited by conditions looking to the promotion of health, the essential requirements of which being well recognized. The Sanitary Code was directed to the securing of a supply of milk to meet the standard of healthy milk. The Virginia Milk Act, while referring to health and general welfare, was recognized by the Supreme Court of Appeals of Virginia as being a purely economic measure looking to the fixing of prices. So, in *Lehman* v. *State Board of Public Accountancy*, 263 U. S. 394, this Court upheld a state statute providing for the issuance of certificates of registration to qualified persons as certified public accountants and to cancel any registration for un-

professional conduct. The aim and purpose to secure qualified public accountants fixed the limitations of the Act.

The appellants were compelled to apply for license or to decline to comply with the regulations of the Commission directing them to apply for license and comply generally with the Act. They could not apply for the benefits of the Act in the request for license and at the same time challenge the validity of the Act. Contending, as the applicants did, and do now, that the Milk Act is invalid upon its face, they were entitled to proceed in a court of equity to prevent the enforcement of penalties in violation of constitutional right. (*Smith* v. *Cahoon*, 283 U. S. 553.)

If the decision of the Supreme Court in *Lieberman* v. *Van Der Carr*, 199 U. S. 552, be considered as supporting the validity of a delegation of power, the decisions of this Court preceding it, to which we refer, and the cases recently decided, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter* v. *United States*, 295 U. S. 495, are in direct conflict to the extent that they dealt with a grant of legislative power without limitation in prescribing rules of conduct and standards for action. This Court in the *Schechter* case did not condemn the attempted delegation of legislative power because the administrative agency could act arbitrarily but because "the Congress is not permitted to abdicate or to transfer to others the essential legislative function with which it is thus vested." In other words, the Act was not defective because the discretion might be arbitrarily exercised, but because there was no measure or standard and without a measure or standard there was improper delegation of legislative function. This is emphasized in the first paragraph in the concurring opinion of Mr. Justice Cardozo in which he said:

> "The delegated power of legislation which has found expression in this Code is not canalized within the banks that keep it from overflowing. It is unconfined

and vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388."

Again, he said that there is no standard definite or even proximate to which the legislation must conform.

The unconstitutionality of the Act on the ground of the improper delegation was not that any regulation had been or could be adopted which was or could be arbitrary or unreasonable but that the legislative function and responsibility with respect to it had been passed to another. As this Court said in *Wichita Railway & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59, cited in the *Hot Oil Case*":

> "In creating such an administrative agency the legislature to prevent its being a pure delegation of legislative power must enjoin upon it certain courses of procedure and certain rules of decision in the performance of its function. * * *"

Whether the Milk and Cream Act passed by the General Assembly of Virginia vesting in an administrative board the power to fix prices and the determination of who shall be engaged in the business without rules or standards by which their action is to be determined, is valid, we submit presents a substantial constitutional question.

C. It is Contended That the District Court Erred in Not Holding That the Milk and Cream Act and the Rules and Regulations Adopted by the Milk Commission Were Invalid Because They Constituted an Interference on the Part of the State With Interstate Commerce.

In Section 1 of the Milk Act, the scope of the statute is indicated by definition. By subdivision II of Section 1, a "distributor" is defined as follows:

> "Persons wherever located or operating *whether within or without the Commonwealth, who purchase*

market or handle milk for resale as fluid milk in the Commonwealth of Virginia." (Italics supplied.)

Section 4 of the Act provides in part:

"No distributor • • • shall buy milk from producers or others for sale within the Commonwealth • • • unless such distributor is duly licensed under the provisions of this Act."

The same section further extends the effect of the Act with the provision:

"It shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by this Act."

The plain meaning of these provisions above quoted is that the distributor in an area designated by the Milk Commission shall not buy from a distributor beyond the borders of the Commonwealth unless the latter distributor shall have obtained from the Commission a license in addition to any other licenses required by existing laws of the Commonwealth or its municipalities (Section 7 of Chap. 357), and that the distributor beyond the Commonwealth may not sell if not so licensed, or that, if so licensed, it shall conform to the prices fixed by the Commission the purchase of fluid milk from producers or the sale thereof to distributors or others in Virginia; shall furnish to the Commission, as required, reports containing "such information as the Commission may require" (Section 4 (o) of Chapt. 357); and shall comply with all other rules, regulations and orders of the Commission applicable to "distributors" as thus defined, subject to incurring the penalties named for violations thereof.

The Act clearly attempts to prevent the free flow of milk into the market area whether it comes from other sections of the State, or whether it comes from Maryland or

the District of Columbia, or any other point beyond the State. The protection of a local market by the exclusion of foreign goods to which no objection is open other than circumstances of foreign competition is exactly the type of legislation against which the Commerce Clause of the Constitution is directed. So, despite the clearly existing emergency of the milk industry in New York which had previously been held to sustain regulation by price-fixing, this Court in *Baldwin* v. *Seelig*, 294 U. S. 511, held that the provisions of the New York Milk Control Act, the effect of which was to fix the price to be paid to producers beyond the borders of the State of New York, were a burden upon interstate commerce and in violation of Article I, Section 8, of the United States Constitution.

Section 11 (b) of the Milk Act provides for the levy of assessments upon producers and distributors not to exceed 2¢ per hundred pounds of milk handled, such assessments being authorized to meet the expense of the Milk Board in any market and of the Milk Commission. The further provision is made that all assessments shall be paid at the time that distributors pay the producers for the milk. Rules and regulations for the area here involved (Regulation No. 6, Appendix) provided for this assessment regardless of the source of the milk.

That interstate commerce may not be thus burdened, we refer to the decision of this Court in *Baldwin* v. *Seelig*, 294 U. S. 511, pp. 521-522. Neither the express provision of the Act that it shall not be construed as affecting interstate commerce nor the disavowal by the Milk Commission of intent to enforce assessment against the interstate commerce, will save the Act from condemnation.

The saving clause, Section 14, of the Virginia Milk and Cream Act, that no provision of the Act shall be construed as to apply to foreign or interstate commerce, except insofar as the same may be effective under the Constitution and

laws of the United States, will not protect the appellants unless and until it is determined that the acts complained of or threatened will interfere with interstate commerce and are therefore within the saving clause. The further question must be settled as to whether the provisions of the Act and the regulations, if found to interfere with interstate commerce, are separable provisions.

Whether the Virginia Milk and Cream Act and the regulations made pursuant thereto, which we sought to be enforced against the appellants, constitute an interference with interstate commerce, presents a substantial question which, together with other Federal questions here involved, should be passed upon by this Court.

VII.

Cases Believed to Sustain Jurisdiction.

In support of their contention that the District Court erred in holding that the Act of the General Assembly of Virginia was a proper exercise of the police power, appellants rely upon the following cases:

Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194;
Borden's Farm Products Co. v. *Ten Eyck*, 297 U. S. 251;
Wolf Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522;
Fairmount Creamery Co. v. *Minnesota*, 274 U. S. 1;
Williams v. *Standard Oil Co.*, 278 U. S. 235;
Tyson, et als. v. *Banton*, 273 U. S. 418;
New State Ice Co. v. *Liebmann*, 284 U. S. 262;
Block v. *Hirsh*, 256 U. S. 135;
Morehead v. *New York*, 80 L. Ed. 921 (1936).

In support of their contention that the District Court erred in failing to hold that the Virginia Milk Act was in-

valid as an improper delegation of legislative power to the Milk Commission, and in holding that the power conferred upon the Commission involved a denial of equal protection of the laws and a denial of due process in contravention of the Fourteenth Amendment to the Constitution of the United States, appellants rely upon the following cases:

Panama Refining Co. v. *Ryan,* 293 U. S. 388;
Schechter Corporation v. *United States,* 295 U. S. 495;
Yick Wo v. *Hopkins,* 118 U. S. 366;
Barbier v. *Connolly,* 113 U. S. 27;
Wichita Railway & Light Co. v. *Public Utilities Commission,* 260 U. S. 48, 59;
Mutual Film Corporation v. *Ohio Industrial Commission,* 236 U. S. 230, 245;
Eubank v. *City of Richmond,* 226 U. S. 137;
Thompson v. *Smith,* 155 Va. 367;
Taylor v. *Smith,* 140 Va. 217;

In support of their contention that the District Court erred in not holding that the Virginia Milk and Cream Act and the rules and regulations adopted by the Commission were invalid because they constitute an interference on the part of the State with interstate commerce, the appellants rely upon:

Baldwin v. *Seelig,* 294 U. S. 511.

It is respectfully submitted, in view of the foregoing substantial questions and the express provisions of Section 266 of the Judicial Code, as amended, U. S. Code Title 28, Section 380, that this Court has jurisdiction.

E. Randolph Williams,
T. Justin Moore,
Philip W. Rosenfeld,
Counsel for Appellants.

Milk and Cream Act.

AN ACT to Provide for the Supervision, Regulation and Control of the Production, Processing, Transportation, Storage, Distribution, and Sale of Milk and Cream; to Create a Milk Commission and Local Milk Boards and to Define and Provide for the Functions, Duties and Powers Thereof.

Reprinted from Acts of Assembly, Session 1934.

[Chapter 357.]

Richmond Division of Purchase and Printing, 1935.

Milk and Cream Act

CHAP. 357.—AN ACT to provide for the supervision, regulation and control of the production, processing, transportation, storage, distribution, and sale of milk and cream; to create a Milk Commission and local milk boards and to define and provide for the functions, duties and powers thereof; to provide for the appointment, suspension, removal, compensation, costs, and expenses of such commission and boards and the members, officers, agents and employees thereof; to provide for licensing processors, bottlers, wholesalers, distributors, and retailers of milk and cream, or either; to provide for the raising of funds for the administration of this act and to provide for the disposition of revenue collected hereunder and to impose penalties for violation of the provisions of this act.

[H B 396.]

Approved March 29, 1934.

Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to pur-

chase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political sub-divisions thereof; and

Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth; and

Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transporation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; now, therefore,

1. Be it enacted by the General Assembly of Virginia, as follows:

Section 1. Definitions.—As used in this act, unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

"Person" means any person, firm, corporation or association.

"Commission" means the milk commission created by this act.

"Distributor" means any of the following persons engaged in the business of distributing, marketing, or in any manner handling fluid milk, in whole or in part, in fluid form for consumption in the Commonwealth of Virginia:

I. Persons, irrespective of whether any such person is a producer:

(a) who pasteurize or bottle milk or process milk into fluid milk;

(b) who sell and/or market fluid milk at wholesale or retail

(1) to hotels, restaurants, stores or other establishments for consumption on the premises

(2) to stores or other establishments for resale, or

(3) to consumers;

(c) who operate stores or other establishments for the sale of fluid milk at retail for consumption off the premises.

II. Persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia.

"Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk for sale as fluid milk in the Commonwealth of Virginia.

"Producer-distributor" means a distributor who handles only milk produced by himself.

"Consumer" means any person, other than a milk distributor who purchases milk for human consumption.

"Market" means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area.

"Licensee" means a licensed milk distributor.

"Milk" means the clean lacteal secretion obtained by the complete milking of one or more healthy cows properly fed, housed and kept; including milk that is cooled, pasteurized, standardized or otherwise processed with a view of selling it as fluid milk, cream, buttermilk (either cultured or natural buttermilk, and including cultured whole milk in its several trade forms) and skimmed milk; said term excludes the lacteal secretion of one or more dairy animals where lacteal secretion is sold or intended to be sold for any other purpose.

"Subsidiary" means any person of, or over whom or which a distributor or an affiliate of a distributor has, or several distributors collectively have, either directly or in-

indirectly, actual or legal control, whether by stock ownership or in any other manner.

"Affiliate" means any person and/or subsidiary thereof, who has, either directly or indirectly, actual or legal control, over a distributor, whether by stock ownership or in any other manner.

"Board" means the local agency authorized by this act to administer the operation of the act in each market area operating under the provisions of this act, to be known as the "milk board" of the particular market area in which it functions.

"Books and records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence, or other data, pertaining to the business of the person in question.

"Health authorities" includes the State Board of Health, the Virginia Dairy and Food Division of the State Department of Agriculture and Immigration and the Director thereof, and the local health authorities.

"Sanitary regulations" includes all laws and ordinances relating to the production, handling, transportation, distribution and sale of milk and, so far as applicable thereto, the State sanitary code and lawful regulations adopted by the dairy and food divisions, or by the board of health of any county or municipality.

SECTION 2. Milk Commission.—(a) There is hereby created a Milk Commission, consisting of three members, two of whom shall be producers of milk who are not directly or indirectly engaged in the distribution thereof, and the third member shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom, who shall be appointed by the Governor of Virginia to hold office at the pleasure of the Governor and may be removed at any time by the Governor. Any vacancies occurring shall be filled by appointment by the Governor. One member of said commission shall act as chairman, as designated by the Governor. The technical and other services for such commission shall be performed, so far as practicable, by forces and officers in the Department of Agriculture and Immigration, the Virginia Agricultural

Extension Division of the Virginia Agricultural Experiment Station, without additional compensation. The Milk Commission may appoint and, at pleasure, remove the secretary of the Milk Commission and any such additional technical and other assistants and employees as may be necessary to carry out the provisions of this act, and to prescribe their powers and duties.

(b) The members of the Milk Commission shall be paid each the sum of ten dollars per day for each day actually spent in the performance of their official duties, plus their actual and necessary expenses.

(c) The commission shall fix the compensation of the secretary of the Milk Commission and other employees.

(d) The secretary shall, subject to the limitations herein contained and the rules and regulations of the commission, enforce the provisions of this act, but no official act shall be taken, rule or regulation be promulgated, or official order made or enforced, with respect to the provisions of this act, without the approval of the majority of the members of the commission.

(e) The principal offices of the commission shall be in the city of Richmond, in rooms assigned by the Director of the Division of Grounds and Buildings.

(f) Two members of the commission shall constitute a quorum.

SECTION 3. Powers.—The commission is hereby declared to be an instrumentality of the Commonwealth, vested with power:

(a) To confer and co-operate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, with respect to milk coming into the Commonwealth and going out of the Commonwealth in interstate commerce, with a view of accomplishing the purposes of this act, and to enter into a compact or compacts for such uniform system of milk control.

(b) To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia.

(c) To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

(d) To act as mediator or arbiter in any controversial issue that may arise among or between milk producers and distributors, as between themselves, or that may arise between them as groups.

(e) To examine into the business, books and accounts of any milk producer, association of producers or milk distributors, their affiliates or subsidiaries; to issue subpœnas to milk producers, associations of producers, and milk distributors, and to require them to produce their records, books and accounts; to subpœna any other person from whom information is desired.

(f) To take depositions of witnesses within, or without, the Commonwealth. Any member of the commission, or any employee designated by the commission, may administer oaths to witnesses and sign and issue subpœnas.

(g) To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the purposes of this act. Every rule or order of the commission shall be posted for inspection in the main office of the commission, and a certified copy filed in the office of the Commissioner of Agriculture. An order, applying only to a person or persons named therein, shall be served on the person or persons affected. An order herein required to be served, shall be served by personal delivery of a certified copy, or by mailing a certified copy in a sealed envelope, with postage prepaid, to each person affected thereby; or, in the case of a corporation, to any officer or agent of the corporation upon whom legal process may be served. The posting in the main office of the commission of any rule and of any order, not herein required to be served, and such filing in the office of the Commissioner of Agriculture, shall consti-

tute due and sufficient notice to all persons affected by such rule or order.

(h) The operation and effect of any provision of this act conferring a general power upon the commission shall not be impaired or qualified by the granting to the commission by this act of a specific power or powers.

(i) The commission shall not exercise its powers in any market until a public hearing has been held for such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market.

The commission may on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of the Commonwealth of Virginia, supplying in the judgment of the commission a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors, distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission may withdraw the exercise of its powers from any market after a public hearing has been held for such market, and the commission determines that it will be to the public interest to withdraw the exercise of its powers from such market. The commission may on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of Virginia, supplying in the judgment of the commission, a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors distributing a substantial pro-

portion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly.

(j) The commission, after public hearing and investigation, may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public.

(k) The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the Commonwealth.

(l) Any member of the commission, or employee designated for the purpose, shall have access to, and may enter at all reasonable hours, all places where milk is stored, bottled or manufactured into food products. Any member of this board, or designated employee shall have the power to inspect books and records in any place within the Commonwealth for the purpose of ascertaining facts to enable

the board to administer this act, and all such information shall be confidential unless the parties concerned agree to its being given out. The commission may combine such information for any market or markets and make it public.

(m) The commission may define what shall constitute á natural market area and define and fix the limits of the milkshed or territorial area within which milk shall be produced to supply any such market area; provided, that producers, producer-distributors, or their successors now shipping milk to any market may continue so to do until they voluntarily discontinue shipping to the designated milk market.

(n) The commission may delegate such of the powers given it by this act as it sees fit to the milk board in any particular market area, for the purpose of carrying out the provisions of this act within said market area.

(o) Each licensee shall, from time to time, as required by the commission, furnish to the commission verified reports containing such information as the commission may require.

SECTION 4. No distributor in a market in which the provisions of this act are in effect shall buy milk from producers, or others, for sale within the Commonwealth, or sell or distribute milk within the Commonwealth, unless such distributor is duly licensed under the provisions of this act. It shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by this act. It shall be unlawful for any distributor to deal in, or handle milk if such distributor has reason to believe it has previously been dealt in, or handled, in violation of the terms and provisions of this act.

SECTION 5. An application to the commission for a license to operate as a distributor shall be made by mail or otherwise within five days after the provisions of this act become effective in a market, and as to any distributor thereafter beginning business, before such distributor shall begin such business therein. The application shall be made on blanks furnished by the commission for the purpose.

SECTION 6. Any order of the commission in refusing to issue a license, or suspending or revoking a license, may be reviewed on appeal to the Supreme Court of Appeals.

SECTION 7. The licenses required by this act shall be in addition to any other licenses required by existing laws of the Commonwealth of Virginia or by any municipal ordinance. Nothing in this act shall be construed to conflict with or repeal any laws now in force in the Commonwealth of Virginia relating to any board of health or sanitary code now in force in this Commonwealth or in any municipality thereof, nor any municipal ordinances relating to the inspection, grading, production, sale or distribution of milk.

SECTION 8. Any person failing or refusing to comply with any subpœna issued by the commission or pursuant to its authority, shall be deemed guilty of a misdemeanor, and upon conviction, may be punished by a fine not exceeding one hundred dollars or by imprisonment not exceeding ninety days, or both, and each day during which such violation shall continue shall be deemed a separate offense. In the event any person shall fail to comply with any rule, regulation or order of the commission, or obey any subpœna issued thereby, or in the event of the refusal of any witness to testify to any matter concerning which he lawfully may be interrogated by the commission or its representative, it shall be the duty of the hustings court of the city of Richmond, or judge thereof, upon application of the commission, to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpœna issued from said court, refusal to testify therein, or disobedience of an order or decree of such court. The proceedings herein authorized in the hustings court to compel obedience shall be in addition to the provisions of this section defining what shall constitute a misdemeanor and providing and prescribing the punishment therefor.

SECTION 9. The Milk Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the local milk boards in the form of monthly

assessments, and the local milk boards shall pay the assessments so levied. The assessments so levied shall not exceed two cents per hundred pounds of milk handled in each market in which the provisions of this act are in operation.

SECTION 10. All receipts from assessments paid under this act shall be paid by the commission to the State Treasurer and shall be placed by the State Treasurer in the general fund to the credit of an account to be known as the "Milk Commission account" and such amount as may be necessary, and no more, hereby is appropriated out of such Milk Commission account for the payment of all expenses incurred by the Milk Commission in administering and enforcing this act.

SECTION 11. Local milk boards.—(a) Members. For the purpose of securing the benefits of this act, in any market area, the producers and distributors and producer-distributors in that market area shall establish a milk board of five members to carry out the provisions of this act in conjunction with the State Milk Commission. Each local milk board shall be composed of two representatives of the producers supplying milk to the market, one of whom shall be named by the producers' co-operative marketing association operating in the market, and in markets where the producers' co-operative market association handles the selling of fifty per centum or more of the milk, the association shall have the right to name both representatives of the producers on the milk board; and two representatives of the distributors operating in the market. In markets where producer-distributors handle fifty per cent or more of the milk used in the market the Milk Commission shall determine the representation of the producers, the producer-distributors and distributors on the milk board on a basis fair to all parties.

The Milk Commission shall appoint the fifth member of the milk board to represent the consumers and the public interest, who shall serve as chairman of the board. The representative of the consumers and the public interest shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom.

(b) Expenses.—The expenses of the milk board, including salaries and/or per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this act, and including the assessments levied by the State Milk Market Commission, shall be met by an assessment of not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) sold by producers. The exact amount of each monthly or semi-monthly assessment shall be determined by the milk board as necessary to cover its expenses. All assessments shall be paid at the time the distributors pay the producers for the milk. All officers and employees of the milk board who handle funds of the board, or who sign or countersign checks upon such funds, shall severally give bond in such amount and with such sureties as shall be determined by the milk board. The cost of such bonds shall be paid by the milk board and the milk board shall determine the amount and sufficiency of such bonds.

(c) Powers.—The milk board shall perform such functions as the Milk Commission shall delegate to it.

Section 12. In the event of violation of any provision of this act, in addition to any other remedy, the commission may apply to any court of record in the city of Richmond for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist.

Section 13. Penalties.—Any person violating any provision of this act or of any license issued by the commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, and each day during which such violation shall continue shall be deemed a separate

violation. Prosecutions for violating the provisions of this act shall be instituted by the Commonwealth's attorney of the Commonwealth, or otherwise, in any county or city of the Commonwealth of Virginia in which the provisions of this act are in effect.

SECTION 14. Saving clause.—No provision of this act shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

SECTION 15. Conflicting laws.—The making of marketing agreements between producers' co-operative marketing associations and distributors and producer-distributors under the provisions of this act shall not be deemed a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily nor shall the marketing contract or agreements between the association and the distributors and producer-distributors, or any agreements authorized in this act, be considered illegal or in restraint of trade. All laws or parts of laws in conflict with the provisions of this act are hereby repealed to the extent necessary for the full operation of this act.

SECTION 16. Constitutionality.—If any section, clause, or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby.

SECTION 17. Termination.—The period of public emergency during which this act shall be effective shall be until such date as the Legislature may, by joint resolution, designate to be the termination thereof, or if the Legislature be not in session the date so designated by a proclamation of the Governor.

2. An emergency existing, this act shall be in force from its passage.

COMMONWEALTH OF VIRGINIA

State Milk Commission,

Richmond.

Rules and Regulations for the Supervision and Control of the Arlington-Alexandria Milk Market.

Effective 12:01 a. m. April 1, 1936, and posted in the main office of the Commission and a certified copy filed in the office of the Commissioner of Agriculture in Richmond, Virginia.

Definitions.

As used in the rules and regulations, unless otherwise stated, and unless the subject clearly indicates otherwise. "Commission", "Distributor", "Producer", "Producer-distributor", "Consumer", "Licensee", "Milk", "Subsidiary", "Affiliate", "Boards", "Books", "Records", "Health Authorities", and "Sanitary Regulations", are clearly defined in the Milk and Cream Act, chapter 357, Acts of the Assembly, session 1934.

"Milk" means milk so designated by law, including ordinances applicable in the city of Alexandria.

"New Producer" means one who secures a permit from the Health Department, as required on this market, and has also secured permission from the Local Board to sell milk within the sales area after the effective date of these regulations.

"Delivery Period" means the calendar month.

"Basic Allotment" means the established quantity of milk or base set up by the Local Board for each producer on an equitable basis with all other producers for apportioning Class I sales among the producers. The board shall determine the period for fixing allotments which will be based on quantities sold during any given period.

"Basic Quantity" means the quantity of milk or cream each producer receives in Class I as determined by dividing the total sales of Class I by the total allotments and then applying this percentage to each allotment.

"Arlington-Alexandria Sales Area" means the territory included within the following boundaries:

Beginning at the junction of the western boundary of the Arlington County line and the potomac River, thence southwesterly along said county line to the corporate limits of Falls Church, continuing around the western boundary of the corporate limits of Falls Church to Highway 211. Thence northeasterly along Highway 211 to Highway 7. Thence southeasterly along Highway 7 to Highway 244. Then southwesterly along 244 to Road 613. Thence southeasterly and southwesterly along Road 613 to Road 644. Thence southwesterly along Road 644 to Road 635. Thence southeasterly along Road 635 to Road 611. Thence northeasterly along Road 611 to Road 633. Thence northeasterly along Road 633 to Road 628. Thence along Road 628 in a southerly and easterly direction to Road 626. Thence northeasterly along Road 626 to Road 629. Thence southerly along Road 629 to Road 626, thence easterly along Road 626 to Highway 235. Thence easterly in a straight line to the Potomac River. Thence northerly and westerly along the Virginia side of the Potomac River to the western boundary of the Arlington County line, the point of beginning.

"Arlington-Alexandria Production Area" means the territory included within the following boundaries:

Beginning at the junction of the Stafford and Prince William County line at the Potomac River. Thence northwesterly along said line to Highway 1. Thence southerly along Highway 1 to Highway 3. Thence westerly along Highway 3 to Highway 20. Thence westerly along Highway 20 to Highway 49. Thence southerly along Highway 49 to North Anna River. Thence westerly along said river to Highway 4. Thence northwesterly along Highway 4 to Highway 29. Thence northerly along Highway 29 to Highway 16. Thence northerly along said highway to Highway 211. Thence

northeasterly along said highway to Highway 3. Thence northerly along said highway to county line of Warren and Rappahannock. Thence northeasterly along said line to the Warren and Fauquier County line. Thence in the same direction to Clarke-Fauquier County line. Thence in the same direction along said line to the Clarke-Loudoun County line. Thence northeasterly along said line to the intersection of the West Virginia and Virginia state line. Thence northerly along said state line to the Potomac River. Thence down the Potomac River to the junction of the Stafford and Prince William County line, the point of beginning.

Provided, however, that those farms outside such boundaries from which on the effective date of the regulations milk is marketed for distribution as fluid milk in the sales area shall not be excluded from the production area.

REGULATION No. 1.

Minimum Prices to be Paid Producers for Milk.

A. Distributors shall pay producers, on or before the fifteenth day of each month following the close of each delivery period, the following prices for milk delivered in the Arlington-Alexandria Sales Area. All distributors shall pay the producers a differential, in addition to the schedule of prices set forth below for Class I Milk; they shall pay the producers an additional 6c per hundred pounds for each 1/10 of 1% above 4%, and shall deduct 6c per hundred pounds for each 1/10 of 1% below 4%.

Class I Milk	$3.08 per cwt. for 4% milk.
Class II Milk	The average price of 92 score butter in New York, for the current delivery period, as reported by the U. S. Dept. of Agri., multiplied by the per cent. of butterfat in the milk, plus 35¢ per cwt.

Class I Milk shall include all milk as follows:

(a) All milk for consumption or use sold by distributors in bulk or in bottles.

(b) All cream for consumption or use sold by distributors in bulk or in bottles.

(c) All cultured wholemilk for consumption or use sold by distributors in bulk or in bottles.

(d) All milk or cream used in chocolate milk.

(e) All milk or cream used in cottage cheese.

Class II Milk shall include all milk as follows:

(a) All milk used for manufacturing purposes.

B. The butterfat content of all milk delivered by each producer shall be determined by three or more tests made at approximately equal intervals during a delivery period. All testing for the butterfat content of milk and cream shall be made by the Babcock test and shall be subjected at all times to check tests made by a qualified representative of the Local Board.

C. A distributor shall not use in Class II, milk that can be used or disposed of in Class I. And no Class I or Class II milk can be purchased, brought in, or handled by distributors so long as local producers supply the demand for Classes I and II milk for this market.

Regulation No. 2.

Confidential Report to the Milk Board Chairman.

Each licensee in the Arlington-Alexandria Sales Area shall file with the chairman of the Arlington-Alexandria Milk Board on forms furnished by the board, on or before the tenth day of each month following the close of each delivery period, a report showing the following information for that period. This report shall be kept confidential and shall only be examined by the Local Board chairman or a

person authorized by the chairman, and the Commission or its authorized employee:

(a) The total weight of milk and/or cream received from each producer delivered to said distributor.

(b) The average butterfat test for each producer delivering milk and/or cream.

(c) The total weight and butterfat test of milk and/or cream purchased from other distributors.

(d) The total weight and average butterfat test that is sold in the following classifications: (1) Class I Milk (2) Class II Milk (3) Cultured wholemilk (4) Chocolate Milk (5) 18-22% cream and (6) 38-42% cream.

(e) Total weight and butterfat test of milk and/or cream sold to other distributors.

(f) The price per hundred paid for milk and/or cream from other distributors.

(g) The price per hundred received for milk and/or cream from other distributors.

Regulation No. 3.

Farm Basic Allotments.

A. Each distributor in the Arlington-Alexandria Sales Area shall file with the Local Board within ten days after being licensed to handle milk by the State Milk Commission, the basic allotment of each producer delivering milk to him. These allotments may be set up in their entirety or may be revised within the discretion of the Local Board. Basic allotments must be at all times set up and be on an equitable basis among all producers. The allotments of all producers shall be set up and made to include Class I Milk.

B. No distributor shall take on a new producer without the consent of the Local Milk Board.

C. Producers shall at all times deliver to their distributors all milk produced by them, except such milk as may

be needed for home consumption, and no producer shall have a basic allotment in more than one market or with more than one distributor on that market.

D. A new producer shall receive for his total deliveries, during his first four full delivery periods, Class II price for his milk. After that time his basic allotment shall be set up by the Milk Board on a basis equitable with the other producers.

E. Any producer who fails to deliver his basic quantity during the months of October, November, and December, shall have his basic allotment lowered by the Milk Board. The Board, however, shall have the authority to waive this requirement for sufficient cause of an emergency character.

F. A renter or tenant who is a producer may retain his allotment in the event he moves from one farm to another, provided he is the owner of the entire herd.

G. Application for the transfer of basic allotments must be accompanied by evidence showing a bona fide sale of the real estate which was used in the production of milk under the basic allotment in question.

Regulation No. 4.

Retail and Wholesale Selling Prices.

The following schedule of minimum prices shall prevail in the Arlington-Alexandria Sales Area:

		Retail	Wholesale
(a)	Milk 3.25–4.1% butterfat:		
	Gallons—bulk		38¢
	Quarts	13¢	11
	Pints	7	6
	Half-pints	5	3
(b)	Milk 4.11–5.25% butterfat:		
	Gallons—bulk		43¢
	Quarts	15¢	13
	Pints	8	7
	Half-pints	5½	4

		Retail	Wholesale
(c)	Cultured Wholemilk:		
	Gallons—bulk		38¢
	Quarts	13¢	11
	Pints	7	6
	Half-pints	5	3
(d)	Chocolate Milk:		
	Gallons—bulk		38¢
	Quarts	13¢	11
	Pints	7	6
	Half-pints	5	3
(e)	Cream 18–22% butterfat: (sweet or sour):		
	Gallons—bulk		$1.50
	Quarts	55¢	45
	Pints	32	28
	Half-pints	17	15
	Gills	10	9
(f)	Cream 38–42% butterfat (sweet or sour):		
	Gallons—bulk		$2.75
	Quarts	$1.10	85
	Pints	60	50
	Half-pints	34	30
	Gills	20	18

Regulation No. 5.

Rules of Fair Practice.

Each distributor in the Arlington-Alexandria Sales Area shall observe the following rules of fair practice:

A. The sale of articles under Regulation No. 4 shall be in containers or bottles of the size specified, and no milk and/or cream can be sold in excess of or below the butterfat content as is provided in paragraphs (a), (b), (e), and (f) of Regulation No. 4.

B. All prices listed in the retail price schedule shall apply on sales to consumers from wagons and stores.

C. The prices listed in the wholesale price schedule shall apply only on sales to hotels, restaurants, stores, hospitals, schools, licensed boarding houses, and other establishments having a merchant's license, where milk is resold for consumption whether on or off of the premises.

D. No distributor shall exchange new milk for milk previously sold or shall at any time take back milk from a store or any other place that buys milk for retail sale. All milk delivered by a distributor to a purchaser must be accounted for in the Class in which it is sold in the report of the distributor to the Local Board.

E. Nothing in this regulation shall be construed to prohibit a distributor from submitting bids asked for by any governing body of any municipality, county, state, or federal government, including relief agencies, charitable institutions, or any other agency entirely supported by the above mentioned governing bodies. Provided, however, that all such bids must reflect the cost plus a reasonable handling charge as set up under the regulations governing any particular sales area in which such institutions may be operating.

F. No distributor, his officer, employees, or agents, shall engage in any method or device whereby any article is sold or offered for sale at a price less than the price set up under Regulation 4, whether by discount, rebate, redeemable certificates, stamps, free service, merchandise, loans, installation of equipment, or combined price for such milk together with another commodity sold or offered for sale, credit beyond the usual course of business, or any other valuable consideration.

Regulation No. 6.

Assessments by the Milk Board.

Each distributor shall pay to the Milk Board all assessments levied on him by the Milk Board, (except on that milk which has been purchased from licensed distributors), and shall deduct and pay to the Milk Board all assessments levied by the Board on each producer delivering milk to

him. No assessment on producers shall exceed 2¢ per hundred pounds of milk, and no assessment on distributors shall exceed 2¢ per hundred pounds of milk. 1¢ per hundred pounds shall be levied and collected by the Milk Board on all milk received by a distributor and 1¢ per hundred on all milk sold or used by a distributor. Such assessment shall be collected on the fifteenth day of each month following the previous delivery period, and delivered to the secretary of the State Milk Commission for deposit to the account of the State of Virginia.

In regard to milk sold by one distributor to another, commonly called "exchange milk", the first distributor shall be responsible for all assessments.

STATE MILK COMMISSION,

(Signed) By J. S. AGNEW,

Chairman.

Copy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

In Equity. No. 363.

Highland Farms Dairy, Incorporated, a Corporation, and Luther W. High, *Plaintiffs*,

vs.

J. S. Agnew, Chairman, and Kone Brugh and T. R. Snavely, as the Members of the Milk Commission of the Commonwealth of Virginia, *Defendants*.

(Argued July 30, 1936. Decided October 3, 1936.)

Before Soper, Circuit Judge, and Way and Pollard, District Judges.

Hunton, Williams, Anderson, Gay & Moor-, Philip W. Rosenfeld, Counsel for plaintiffs (E. Randolph Williams, T. Justin Moore, Stephen H. Simes and Philip W. Rosenfeld, of Counsel), and Edwin H. Gibson, Assistant Attorney General and John S. Barbour, Counsel for defendants.

I concur: Luther B. Way, U. S. D. J. Robt. N. Pollard, U. S. D. J.

Soper, *Circuit Judge:*

The plaintiffs in this suit in equity challenged the constitutionality of the Virginia Milk and Cream Act, ch. 357 of the Acts of the General Assembly of Virginia of 1934, and prayed for a temporary and permanent injunction enjoining the members of the State Milk Commission, a body created by the Act, from exercising the powers therein conferred upon it. A court of three judges was organized under the provisions of 26 U. S. C. A. 380 to consider the case.

Material provisions of the statute may be summarized as follows: The preamble declares that the prosperity and health of the people of the state depend to a substantial degree upon the production and distribution of milk and cream; that the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities which has broken down the orderly production and marketing of milk and cream; that unhealthful, unfair, unjust, destructive and demoralizing trade practices have grown up and are carried on in the production, sale and distribution of milk and cream in the state which impair the constant supply of pure wholesome milk to the inhabitants; and that in order to protect the well being of the people and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution and sale of milk and cream in the state should be supervised and controlled in the exercise of the police power of the state as a business affecting the public peace, health and welfare.

"Distributor" is defined by Section 1 to include amongst others, persons who sell or market milk at wholesale or retail, or who operate stores for the sale of milk at retail for consumption off the premises, and persons, wherever located or operating, whether within or without the state, who purchase, market or handle milk for resale in the state. "Market" means one or more cities, towns or villages of the state and the surrounding territory designated by the Commission as a natural marketing area.

Section 2 of the Act creates a state Milk Commission. Section 3 confers upon the Commission the power, amongst others, (b) to investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the state; (c) to supervise, regulate and control such operations in milk for consumption within the state; (g) to make and enforce rules and regulations necessary to carry out the purposes of the act; (m) to define what shall constitute a natural market area and fix the limits of the area within which milk shall be produced to supply any such market area; (i) to exercise its powers in any market after a public hearing has been held for

such market, and after the Commission determines that it would be to the public interest that it shall exercise its powers in such market. The hearing may be had upon its own motion or upon the application of producers supplying a substantial proportion of the milk consumed in the market or of distributors distributing a substantial proportion of the milk consumed in such market. The Commission may withdraw the exercise of its powers from any market after a public hearing has been held and the Commission determines that it will be to the public interest to do so. The Commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume) of milk distributed in said market acting jointly. (j) The Commission may, after public hearing and investigation, fix the prices to be paid producers by distributors in any market and may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market. In determining the reasonableness of the prices to be charged, the Commission is to be guided by the cost of production and distribution, including compliance with sanitary regulations, operation and delivery charges, and the welfare of the public. The Commission may require all distributors in any market to be licensed by the Commission for the purpose of carrying out the provisions of the act. It may decline to grant any license and suspend or revoke a license upon due notice, and after hearing under Section 6 any order of the Commission in refusing to issue a license or suspending or revoking a license may be reviewed on appeal to the Supreme Court of Appeals.

Under Section 4, no distributor in any market in which the act is in effect shall buy milk from producers or others for sale within the State, or sell or distribute milk within the State unless such distributor is duly licensed under the act. It is unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed under the act.

Section 8 provides substantial penalties to be imposed upon any person found guilty of failing or refusing to com-

ply with any subpœna issued by the Commission. Section 9 provides that the Milk Commission shall prepare an annual budget and collect the sums required therefor from the local milk boards in the form of monthly assessments, which will not exceed 2¢ per hundred pounds of milk handled in each market. The Local Milk Boards, provided under Section 11, consisting of five members, are to be established by the producers and distributors in a market area to carry out the provisions of the act in conjunction with the State Milk Commission. The expenses of the Milk Board, including the assessment levied by the State Milk Commission, shall be met by an assessment of not over 2¢ per hundred pounds of milk handled by distributors, and not over 2¢ per hundred pounds sold by producers. Section 13 provides that any person violating any provision of the act or of any license issued by the Commission shall be guilty of a misdemeanor and punished by fine of $25. to $100. or imprisonment in jail for not less than thirty days or more than one year, or by both fine and imprisonment. Section 14 provides that no provision of the act shall apply or be construed to apply to foreign or interstate commerce unless the same may be effective pursuant to the Federal Constitution. Section 16 provides that if any part of the act shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby. Section 17 provides that the period of public emergency during which the act shall be effective shall be until such date as the legislature may designate to be the termination thereof, or if the legislature be not in session, the date so designated by a proclamation of the governor.

The parties have agreed upon a stipulation of facts from which it appears that the Highland Farms Dairy, Incorporated, is a Virginia corporation which has its principal place of business in the District of Columbia where it operates a creamery for the pasteurizing and processing of milk, all of which it sells under contract to the individual plaintiff, Luther W. High, a resident of the District of Columbia. High operates a group of retail stores for the sale of dairy products in Virginia, Maryland and the District of Columbia, and purchases all of the milk sold by

him in Virginia from the Highland Farms Dairy. The latter purchases its milk under contract from farmers and producers in Virginia, Maryland and the District of Columbia, for delivery to the creameries in Washington. About 20% of this milk is purchased from Virginia producers, substantially all of which is produced in an area which has been designated by the Milk Commission as the Arlington-Alexandria Production Area. All of this milk, when received at the dairy, is commingled with milk purchased elsewhere, and it is impossible to determine what portion of the milk eventually sold by High in the territory designated by the Milk Commission as the Arlington-Alexandria Sales Area was originally produced in the said production area.

High makes no delivery of milk, but sells it all for cash at retail in bottles to purchasers at his stores. It is therefore essential to his business that there be a differential between the price charged by him and the prices of other distributors who permit charge accounts and make deliveries. The bottled milk distributed by High in Virginia is sold to him in the District of Columbia but is delivered to his Virginia stores by the dairy trucks upon orders received by telephone.

On March 27, 1936, the State Milk Commission established the Arlington-Alexandria Milk Market, and fixed the prices at which milk should be sold therein. This was done after a public hearing at Richmond, Virginia, on February 20, 1936, which was called by the Commission at the request of the Virginia and Maryland Milk Producers' Association to consider the establishment of such a market. Notice of the meeting was advertised in two newspapers in the area affected from February 6, to February 17, 1936, two notices appearing in one paper and three in another. Consequently producers, consumers and distributors in the area generally had knowledge that the hearing was to be had. Neither of the plaintiffs, however, was present at the meeting or represented thereat. The Commission gave notice at the hearing that it would consult with any group with regard to the establishment and the regulations to be issued, and this offer was accepted by various individuals between the date

of the hearing and the establishment of the area. In establishing the market and the governing rules and regulations, the Commission considered not only the statements and testimony that were made at the public hearing, but also certain treatises upon the production and distribution of milk. The sales and production areas and the governing rules and regulations were finally made effective on June 1, 1936. Plaintiffs had knowledge of the establishment of the area and of the adoption of the rules and regulations, but continuously sold milk at prices lower than the minimums prescribed for wholesalers and retailers respectively in the regulations adopted. For example, the prices per quart fixed by the Commission for the sale of cultured whole milk at wholesale and retail and the prices actually charged therefor by the dairy to High at wholesale, and by High to consumers at retail, were as follows:

	Wholesale	Retail
Commission's price	11¢	13¢
Dairy's price in Washington	6¢	8¢
High's price in Virginia		8¢

A bill similar in purpose to the act finally passed by the Virginia legislature was introduced in the House of Delegates on February 19, 1934, but was rejected by a vote of that body on March 5, 1934. The bill, which eventually became the Milk and Cream Act, was introduced on March 10, 1934, the last day of the session, accompanied by a letter from the governor of the state urging its passage. It passed both houses of the legislature on that day, printings and constitutional readings being waived.

The original bill of complaint was filed herein on May 29, 1936, and prayed for a temporary restraining order enjoining the Milk Commission from exercising its powers in the Arlington-Alexandria Milk Market during the pendency of the action and until the application for interlocutory injunction could be heard. The District Judge, however, refused a restraining order upon the ground that there was no showing of a present danger of irreparable damage, without prejudice to the right of the plaintiff to make subsequent applications. High made no application for a license under

the act, and on June 6, 1936, the Commission threatened to invoke against him the remedy of injunction specified in Section 12 of the act wherein it is provided that if any person fails to comply with any rule or order of the Commission, the Hustings Court of the City of Richmond, upon application of the Commission, shall compel obedience by attachment proceedings for contempt. The amended bill of complaint was thereafter filed in which application for a temporary restraining order and an interlocutory and permanent injunction was renewed; and an answer having been filed, the case came before the court upon these applications.

The plaintiffs' contentions with reference to the constitutionality of the act may be summarized as follows:

(1) The act cannot be upheld as an emergency price fixing measure in the exercise of the police power of the state because (a) there was a total absence of any legislative investigation into the facts; and (b) the legislature did not determine that an emergency existed, but (1) delegated the power to the Commission to determine whether or not the emergency existed, and if so, in what parts of the state; and

(2) authorized the producers and distributors controlling a majority in volume of the milk in any market to put an end to the operation of the act therein; and (3) failed to fix a definite time limit to the operation of the act.

(II) The act is invalid because it contains a delegation of legislative power to the Milk Commission contrary to the state constitution to establish markets and exercise its powers of control over the sale of milk therein and to withdraw the exercise of its powers from such market, to fix prices of the sale of milk, and to issue and revoke licenses to persons to engage in the milk business without reference to any prescribed standard.

(III) The exercise of the powers conferred upon the Commission, as above set out, necessarily involved a denial of the equal protection of the laws and a denial of due process in contravention of the Fourteenth Amendment to the Federal Constitution.

(IV) The action of the Milk Commission in (1) establishing a market, (2) in fixing minimum prices and (3) in adopting rules and regulations, constituted a denial of due process because of procedural errors on the part of the Commission in that (1) the action was based in part on data not introduced in evidence at the public hearing and (2) no evidence as to the cost of the production of milk was taken at that hearing.

(V) The act and the regulations passed by the Milk Commission are invalid because they constitute an interference on the part of the state with interstate commerce in that (1) they required the Highland Farms Dairy, a corporation of the District of Columbia, doing no business in Virginia, to secure a license in order to engage in interstate commerce; (2) and fixed the prices to be paid by High to Highland Farms Dairy for milk sold to him by the corporation in the District of Columbia; and (3) authorized the Commission to levy an assessment on milk shipped in interstate commerce.

The authority of a state legislature in the exercise of the police power to regulate the price of milk through the agency of an administrative board is established by the decision of the Supreme Court in Nebbia *v.* New York, 291 U. S. 502. The act of the state legislature was upheld which established a milk control board with power, among other things, to fix the retail prices to be charged for milk for consumption off the premises where sold. The court held that the rights of property and of contract are not absolute and that the Fifth Amendment, in the field of federal activity, and the Fourteenth as respects state action, do not prohibit governmental regulation of private business for the public welfare, but require only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object to be attained, that the private character of a business does not exempt it from price regulation in the common interest, and that the New York legislature, having found that the low price of milk in the state had led to a demoralization of the market and affected the health and prosperity of the

people, the legislature acted within the scope of its power in prescribing the regulation described. For later decisions of the Supreme Court see Borden's Co. *v.* Baldwin, 293 U. S. 194 and Borden's Co. *v.* Ten Eyck, 297 U. S. 251.

Of equal importance in the determination of the pending case is the decision of the Supreme Court of Appeals of Virginia in Reynolds *v.* Milk Commission of Virginia, 163 Va. 957, 179 S. E. 507, in which the constitutionality of the Virginia Milk Control Act was upheld by a divided court. It was held that there are no substantial differences between the Virginia Act and the New York Act, and that the Virginia Act does not contravene the Fourteenth Amendment of the Federal Constitution, or the similar provision found in Section 1, Article 1 of the Virginia Constitution, but, on the contrary, is a proper exercise of the police power of the state in the public interest in view of the uncontroverted finding by the Virginia legislature of an imperative need to regulate the milk industry in the state even to the extent of fixing prices so as to protect the industry from serious impairment or destruction.

The court declared that the state legislature was better qualified than the court to determine the necessity and degree of regulation of an industry, and that its conclusions should not be disturbed unless they are clearly arbitrary and unreasonable. It was pointed out that arbitrary regulations issued by the Board might be invalid without affecting the constitutionality of the act, and that if the Commission should promulgate such regulations, the courts would declare them to be void.

The court considered the argument that the power given to the Commission to make and enforce rules and regulations was a delegation of legislative power to enact prohibitory legislation operative only in certain areas defined by the Commission and showed that a similar provision had been upheld in the Nebbia case.

Similarly, State Milk Control Acts have been held valid as within the police power of the State in the following decisions of state courts. People *v.* Nebbia, 262 N. Y. 259; State *v.* Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116; State *ex rel.* Finnegan *v.* Lincoln Dairy (Wisc.), 265 N. W.

197; Albert *v.* Milk Control Board (Ind.), 200 N. E. 688; Rohrer *v.* Milk Control Board (Pa.), 186 Atl. 336; Franklin *v.* State (Ala.), 169 So. 295; Miami Home Milk Producers Assn. *v.* Milk Control Board (Fla.), 169 So. 541. In three states, the Supreme Court without questioning the extension of the police power to cover price fixing regulations by state boards under Milk Control Acts, have declared the local statutes invalid because of an improper delegation of legislative power. See Griffiths *v.* Robinson, 181 Wash. 438, 43 P. (2) 977; Md. Cooperative Milk Producers *v.* Miller (Md.), 182 Atl. 432; Van Winkle *v.* Fred Maier (Ore.), 49 P. (2) 1140.

Notwithstanding these decisions, the plaintiffs contend that the Virginia act is unconstitutional as a violation of the due process clause of the Fourteenth Amendment for reasons not considered in Reynolds *v.* the Milk Commission. It is conceded that the legislature may have had power to pass a milk control price fixing act, if the legislature had found that the circumstances of emergency described in the preamble of the act actually existed; but it is asserted that the legislature failed to make such a determination and left the matter to the uncontrolled discretion of the Milk Control Board. It is said that there was no investigation by legislative committee, such as preceded the passage of the New York Act, but the Virginia act was hastily passed on the last day of the legislative session; that under Section 3 (i) the act does not become effective in any marketing area until the commission, after public hearing, determines that it will be to the public interest to exercise its powers therein, and that the commission is authorized to withdraw from any market after a similar hearing and determination; that the failure of the legislature to exercise its own authority is further shown by the provision of Section 3 (i) which gives to a majority of the producers of milk produced and to a majority of the distributors in any market acting jointly the right to cause the Commission to withdraw from that market; and that finally, there was a lack of definite action on the part of the legislature because it made no provision for the termination of the act other than Section 17 which provides that the period

of public emergency, during which that act shall be effective, shall be until the legislature designates the termination, or if it be not in session, the date designated by the proclamation of the governor.

This construction of the act cannot in our opinion be upheld. We may not disregard the positive declarations of the preamble merely because there was no formal investigation by a legislative committee and the statute was passed on the last day of the session. Indeed the rejection of the measure proposed earlier in the session indicates that the subject had been considered with some deliberation. Nor is the interpretation contended for in accord with the decision of the Virginia court in Reynolds *v.* Milk Commission, which points to the legislative determination of fact in the preamble as indicating an imperative need of state control of the production and distribution of milk. Not only is this interpretation binding upon us as the construction of a state act by the highest court of the state, but it is in harmony with our understanding of the legislative intent. We do not think that the authority given to the Board to determine in what areas it should exercise its powers contradicts or nullifies the legislative finding, or amounts to an improper delegation of legislative power. It is merely left to the Board to ascertain whether trade practices, harmful to the public interest, are prevalent in a particular area, and if so, to exercise the power to make rules and regulations and fix prices for the milk produced and distributed therein. The New York act differed in that it was made effective generally, but broad discretion was conferred upon the State Milk Control Board under Section 312 of the act to investigate the reasonable costs and charges for producing milk and to fix the minimum prices to be paid to purchasers of milk in its various grades. Provisions quite similar to the Virginia act are found in the statutes passed in 1935 in Alabama, p. 204, Section 5; in Wisconsin, Chapter 58, Sections 3 (1) (c), 3 (3) (a) and (b); and in Indiana, Ch. 281, Section 15.

There is no impropriety in the legislative delegation of authority to the executive to act or withhold action in carrying out the legislative intent in conformity with principles

laid down in the governing law. Thus Congress may empower the President, when in his opinion the public safety shall require, to lay an embargo on ships in the ports of the United States. Field & Co. *v.* Clark, 143 U. S. 649, 683; or to discontinue the suspension of commercial intercourse with foreign countries, required by an act of Congress; or to suspend by proclamation the free introduction into this country of enumerated articles when satisfied that unreasonable exactions are imposed upon the products of the United States by the country producing them, or to increase or decrease tariff duties so as to equalize the differences between costs of production at home and abroad. Hampton & Co. *v.* United States, 276 U. S. 394. See also United States *v.* Grimaud, 220 U. S. 506, and Fallbrook *v.* Bradley, 164 U. S. 112.

Hence we reject the suggestion that the Arlington-Alexandria Milk Market was illegally established by the Milk Commission in the exercise of an arbitrary power and discretion conferred upon them by the legislature without any legislative standard of action to guide them. We also conclude that this action of the Commission is not invalidated because the legislature in Section 3 (i) directed the Commission to withdraw the exercise of its power from any market upon the written application of a majority of the producers and a majority of the distributors of milk, measured by volume, in said market acting jointly; or because the governor of the state was empowered by Section 17 of the act, if the legislature be not in session, to designate by proclamation the termination of the period of public emergency during which the act shall be effective. No attempt has been made in this case to exercise the powers so described, and we have no occasion to decide whether they may ever be lawfully exercised by the persons named. But even if these provisions are invalid because they contain no guide as to the conditions under which the powers conferred may be exercised, it does not follow that the legislature has not actually found that the emergency exists. The incorporation of invalid sections does not destroy the whole act, because it is provided in Section 16 thereof that if any section, clause, sentence or paragraph thereof be

declared unconstitutional for any reason, the remainder of the act shall not be affected thereby.

Having declared the emergency and the necessity for regulation of the business, the legislature was not without power to delegate to the Board the authority to limit the market areas, to fix the prices to be charged therein, and to issue and revoke licenses to persons engaged in the milk business. These questions did not pass unnoticed by the Virginia court in Reynolds *v.* Milk Commission, either in the majority or minority opinions, where references were made to the power of the board to make rules and regulations necessary to carry out the purposes of the act and to grant and refuse licenses, subject to the review of that court. It is clear that the court would not have sustained the act had the majority of the judges thought that an unconstitutional delegation of power had been granted. The New York act of 1933, Ch. 158, considered in the Nebbia case, provided in Section 312 (b) that the Board should fix prices, which might vary in different markets, and designate the markets to which the prices should be applicable. Prices fixed by the Board did vary as to classes of dealers and localities. See Nebbia *v.* New York, 291 U. S. 502, 520, 540; and it does not appear that the act was deemed to be invalid on this account either in the Supreme Court of the United States or the Court of Appeals of New York. See People *v.* Nebbia, 262 N. Y. 259. The question as to price was definitely decided adversely to the defendants' contention under the New Jersey Act in State *v.* Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116, 124, where it was held that the legislature having declared the general policy and set the standard to be followed, properly left it to the administrative agency to take proper steps to eliminate destructive trade practices and to fix prices with reference to the grade of milk, costs of production, marketing and transportation so as to permit a reasonable return to the producer and the milk dealers. A similar standard was set up in Section 3 (j) of the Virginia act. See also State *v.* Lincoln Dairy Co. (Wisc.), 265 N. W. 197; Albert *v.* Milk Control Board of Ind., 200 N. E. 688, 694; Rohrer *v.* Milk Control Board of Pa., 186 Atl. 337; Franklin *v.* State (Ala.), 169 So. 295; Miami Home Milk Pro-

ducers Assn. *v.* Milk Control Board (Fla.), 169 So. 541 Compare, Griffiths *v.* Robinson, 181 Wash., 438, 43 P. (2d) 977; Maryland Cooperative Milk Producers *v.* Miller (Md.), 182 Atl. 432; Vank Winkle *v.* Maier (Ore.), 49 P. (2) 1140.

In the pending case, the Milk Commission held a public hearing to consider the propriety of exercising its powers in the area affected, and subsequently outlined the Arlington-Alexandria Sales Area and the Arlington-Alexandria Production Area, and passed rules and regulations which undertook to control the production and distribution of milk and fixed the prices to be paid for the product. There is no distinction between the action thus taken in conformity with the standards laid down by the legislature and conduct which was approved in the cited cases.

The plaintiffs emphasize the license provisions of the act, contending that here, in any event, are provisions so devoid of legislative standard as to leave to the Commission the unrestricted power to grant or refuse a license to a dealer in milk in its arbitrary discretion; and it is contended that these provisions not only involve an unlawful delegation of power, but in their effect amount to a denial of due process of law guaranteed by the Fourteenth Amendment. The license provisions are as follows:

> Section 3. (k) The Commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the commonwealth.
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> Section 5. An application to the commission for a license to operate as a distributor shall be made by mail or otherwise within five days after the provisions of this act become effective in a market, and as to any distributor thereafter beginning business, before such

distributor shall begin such business therein. The application shall be made on blanks furnished by the commission for the purpose.

SECTION 6. Any order of the commission in refusing to issue a license, or suspending or revoking a license, may be reviewed on appeal to the Supreme Court of Appeals.

SECTION 8. * * * In the event any person shall fail to comply with any rule, regulation or order of the commission, * * * it shall be the duty of the Hustings Court of the City of Richmond, * * * upon application of the commission, to compel obedience by attachment proceedings for contempt. * * *

SECTION 12. In the event of violation of any provision of this act, in addition to any other remedy, the commission may apply to any court of record in the city of Richmond for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist.

SECTION 13. Penalties.—Any person violating any provision of this act or of any license issued by the commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, and each day during which such violation shall continue shall be deemed a separate violation. * * *

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† No other Milk Control Act, to which our attention has been called, contains conditions of like breadth. The New York Act of 1933, for example, contains in Section 303 (3) specific terms listing the acts or omissions which justify the rejection or suspension of a license, such as unreasonable rejection by a distributor of milk purchased from a producer or failure to pay for milk purchased, or violating any provision of the act.

The stipulation shows that the Milk Commission has threatened to invoke against High the remedy by injunction provided in Section 12 of the act, so as to restrain him from continuing his business as a milk dealer without first having obtained the required license, and also from violating the regulations of the commission as to retail sale prices. It does not appear that High has ever made application for a license or intends so to do; and the only reasonable inference to be drawn from the institution and prosecution of this case is that the plaintiffs, regarding the act as unconstitutional, propose to continue their trade practices irrespective of its provisions.

On the other hand, no conditions or restrictions upon the grant of licenses have been imposed in the regulations of the Board, and there is no indication that a license would be withheld from any one willing to abide by the terms of the statute. In Reynolds *v.* Milk Commission, 179 S. E. 507, 514, it was said that the license provision was not challenged. It might be proper also in the pending case to disregard it in the absence of arbitrary and unreasonable conduct on the part of the commission, and of any evidence that such conduct is contemplated. Nevertheless, it is not inappropriate to point out that the license provisions of the act should not be interpreted to vest the Board with the absolute power to grant or refuse licenses, if any other reasonable instruction can be adopted. Such a grant of power would be invalid and the attempt to exercise it arbitrarily would be restrained by a court of equity as a violation of the due process clause of the Fourteenth Amendment. Yick Wo *v.* Hopkins, 118 U. S. 356; Lieberman *v.* Van De Carr, 199 U. S. 552; Douglas *v.* Noble, 261 U. S. 165; Lehmann *v.* State Board of Public Accountancy, 263 U. S. 394.

In our opinion, the act is susceptible of a more reasonable interpretation. It was not the intent of the legislature to confer upon the administrative board the extraordinary power to determine at will who should and who should not engage in the distribution of milk, but rather to render available to the Milk Commission and the local boards a list of authorized distributors of milk and to enable the authorities more readily to supervise the business of distribu-

tion and to enforce the rules, regulations and orders promulgated by the Board. In the absence of provision to the contrary, it would appear to be the duty of the Board to issue a license to any distributor complying with the statute and to preserve his license until some violation of the act or of a regulation or order had taken place. Such a standard would be sufficient to sustain the act although less specific in detail than other similar statutes. In Lieberman *v.* Van De Carr, 199 U. S. 552, the Supreme Court considered a section of the Sanitary Code of New York City, which provided that no milk should be received for sale and delivered in the City of New York without a permit in writing from the Board of Health. It was objected that the statute devolved upon the Board of Health absolute and despotic power to grant or withhold permits to milk dealers and was therefore not due process of law. The Supreme Court, commenting on the decisions of the New York courts which indicated the power to issue or withhold permits must be used in the exercise of a reasonable discretion and that arbitrary action and unjust discrimination would not be tolerated, said:

> "That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people there can be no doubt."

After citing certain cases, the court continued:

> "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of

state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a federal court."

In Smith *v.* Cahoon, 283 U. S. 553, 562, it was said:

> "The principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration."

See also Lehmann *v.* State Board of Public Accountancy, 263 U. S. 394; Continental Baking Co. *v.* Woodring, 286 U. S. 352, 366-7; The Problem of Apparently Unguided Administrative Discretion by Lewis Allen Sigler, 19 St. Louis L. R. 261, 291, *et seq.*

The cases we have cited also dispose of the contention that the enforcement of the act necessarily entails a denial to the plaintiffs of the equal protection of the laws and the due process of law in violation of the Fourteenth Amendment. Thus in Nebbia *v.* New York, *supra,* it was held that a storekeeper was not denied the equal protection of the laws by an order which required him, if he purchased his supply from a dealer, to buy and sell the product at a minimum price, whereas the dealer might buy his supplies from the farmer and sell them at lower prices, and that such an order was not on its face arbitrary or unreasonable, as there are obvious distinctions between the two sorts of merchants which might well justify a different treatment. Likewise, it was decided that there was no denial of due process in the general scheme of the act because the state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare and if laws passed to that end have a reasonable relation to the legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. (See pages 530-537.)

Nor does the failure of the legislature of Virginia to provide for an appeal to the courts from the decisions or orders of the Board in relation to such matters as the determination of market areas and the fixing of prices amount to a denial of due process. It is true that if a legislature attempts to make the findings of fact of its agencies conclusive, even though the findings are wrong and constitutional rights have been invaded, the legislative action is invalid, for the judicial power of the courts cannot thus be circumscribed. St. Joseph Stock Yards Co. *v.* United States, 298 U. S. 38; Ohio Valley Water Co. *v.* Ben Avon, 253 U. S. 287; Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418. But the statute under consideration does not attempt to circumscribe the powers of a court, and it is not invalid simply because it does not specifically provide for access to the courts. Such access always exists if there is any arbitrary action on the part of the legislature or of a legislative agency which deprives a citizen of his constitutional rights. See Prentis *v.* Atlantic Coast Line, 211 U. S. 210; Louisville & Nashville R. R. Co. *v.* Garrett, 231 U. S. 298, 310; Coal & Coke Ry. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613; Weimer *v.* Bunbury, 30 Michigan, 201.

It seems also to be suggested that the whole act violates the Fourteenth Amendment because of the penal provisions of Sections 8 and 13. Section 8 imposes a penalty not exceeding $100 or imprisonment not exceeding 90 days upon any person failing or refusing to comply with any subpœna issued by the Commission and each day during which the violation continues is deemed a separate offence. Section 13 imposes a penalty by fine of not less than $25 or more than $100 or imprisonment in jail for not less than thirty days nor more than one year, or both fine and imprisonment, upon any person violating any provision of the act or of any license issued by the Commission, and each day during which the violation continues is deemed a separate violation. No attempt has been made in this case to enforce a penalty under either section. Even if it be supposed that these penalties are so excessive in their cumulative effect that defense in a criminal case would not afford a reasonable opportunity to test the propriety of the action of the

commission, it does not follow that the whole act is invalid. The procedure to be followed with regard to such penalties, when the enforcement of the orders of a legislative agency or administrative body is resisted on constitutional grounds, is suggested by the decision in Oklahoma Operating Co. *v.* Love, 252 U. S. 331. Under the statute considered in that case, the order of the State Corporation Commission was not reviewable in any court of the state and the only opportunity for a judicial test was to disobey the order and to apply to the Supreme Court, meanwhile running the risk of the imposition of accumulating penalties, not exceeding $500 a day. It was held that the provision for the enforcement of the act by penalties was violative of the Fourteenth Amendment, and that the plaintiff was entitled to a temporary injunction in the federal court restraining the enforcement of the penalty pending the final hearing upon the constitutionality of the order. If, upon final hearing, the order should be found to be invalid, permanent injunction against the enforcement of the order should be issued, and likewise, if the order should be found to be lawful, permanent injunction should nevertheless be issued to restrain enforcement of penalties pendente lite, provided that it be found that the plaintiff had reasonable ground to contest the order. Compare Missouri Pac. R. Co. *v.* Nebraska, 217 U. S. 196; Wadley Southern R. Co. *v.* Georgia, 235 U. S. 651.

The plaintiffs also complain that the action of the Milk Board in establishing the market area and fixing the minimum prices for production and distribution of milk was not had in accordance with the provisions of the statute, and was taken in violation of due process of law. The point relates to the nature of the public hearing which the Commission conducted. Section 3 (i) provides that the Commission shall not exercise its power in a market until a public hearing has been held for such market and the Commission determines that it will be to the public interest to exercise its powers therein; and Section 3 (j) provides that the Commission, after public hearing and investigation, may fix the prices to be paid producers by distributors and to be charged in the wholesale and retail distribution of milk, taking into consideration in determining the reason-

ableness of the prices, the cost of production and distribution, and the welfare of the general public.

A public meeting was held in Richmond, Virginia, on February 20, 1936, at which were present a score of dairymen and milk producers and some discussion as to the establishment of the market area and the prices of milk took place. It is stipulated that thereafter the Commission established the area and the rules and regulations not only upon the basis of the information obtained by it at this public hearing, but also upon the basis of information subsequently furnished it by interested persons during the month of March, the Commission having announced at the hearing that it would receive additional communications. The Commission also took into consideration certain treatises which the Commission had in its files or received subsequent to the hearing bearing upon the general subject of the marketing of milk. It is contended that not only was the evidence presented at the hearing entirely inadequate to enable the commission to carry out the duties imposed upon it by the act, but that the commission violated the rules of proper procedure when it took into consideration material not offered at the hearing.

The plaintiffs particularly rely on the decision in Morgan *v.* United States, 56 S. Ct. 906, which dealt with the duty imposed upon the Secretary of Agriculture to grant a full hearing and receive evidence before fixing rates for stock yard services under the Packers' and Stock Yards' Act of 1921. It was held that while the order of the Secretary was legislative, the proceeding had special attributes, and that the Secretary was required to make his determination in accordance with the procedural requirements contemplated by the statute, including a full hearing and the reception of evidence adequate to support the necessary findings of fact. Attention was called to the provision of the Packers' and Stock Yards' Act which makes applicable to the jurisdiction, powers and duties of the secretary, all laws relating to the suspension or restraint of the enforcement of orders of the Interstate Commerce Commission. The cases cited by the Supreme Court show that it is well established that a proceeding of this character before the Inter-

state Commerce Commission has a quasi judicial character and that the usual incidents of due process applicable to an adversary proceeding must be followed.

But it is our view, expressed in the absence of a controlling interpretation by the state court, that these cases have no application to the sort of hearing contemplated by the Virginia Milk Control Act. The proceeding before the Milk Commission was not quasi judicial but legislative. It is true that the act made provision for a public hearing without which the Commission was not authorized either to exercise its powers in any market area or to fix prices; but this hearing was to be of the same nature as that held by a legislative committee in considering proposed legislation. The act contains no directions as to the kind of notice to be given, and evidently merely contemplated notice by advertisement to the general public. No other notice was feasible, considering the large number of persons engaged in production and distribution of milk. The commission was undoubtedly justified in the exercise of its legislative function in taking into consideration not only the facts presented at the public hearing, but those which came to it subsequently from interested parties or were disclosed by its own investigation into the facts and the literature bearing upon the subject. See State *v.* Newark Milk Co., 179 A. 116, 125-6; Norwegian Nitrogen Co. *v.* United States, 288 U. S. 296, 308.

Even if the commission's hearing was quasi-judicial, the plaintiffs have small ground to complain. Although wide publicity was given prior to the hearing, the plaintiffs failed to attend and offer evidence; nor have they since applied to the Board for a modification of this action on the ground that it was arbitrary or ill advised. The courts have quite generally taken the position that one who complains of the unreasonable character of rules and regulations adopted by an administrative board must seek relief from the board before applying to the courts. See Red "C" Oil Mfg. Co. *v.* Board of Agriculture, 222 U. S. 380, 394; Hegeman Farms Corp *v.* Baldwin, 293 U. S. 163, 172; Peterson Baking Co. *v.* Bryan, 290 U. S. 570, 575; Reynolds *v.* Milk Commission,

179 S. E. 507, 515; Rohrer *v.* Milk Control Board, 186 Atl. 326.

Finally, the complainants say that the act and the regulations in pursuance thereof are invalid because they impose a burden on interstate commerce in violation of Sections 8 and 10 of Article 1 of the Federal Constitution. The argument rests, so far as Section 8 is concerned, upon the interpretation of certain provisions of the act to mean that a distributor of milk in an area established by the Commission is forbidden to buy from a distributor located beyond the borders of the state unless the latter shall have first obtained a license from the Commission; and also that the distributor beyond the state, unless licensed, is forbidden to make such a sale; and that if the foreign distributor is licensed, he shall conform to the prices fixed by the commission and shall comply with its rules and regulations and orders, subject to incurring the penalties prescribed by the act. This interpretation is based upon the definition of "distributor" in Section 1 of the act to include persons, whereas located or operating, whether within or without the Commonwealth of Virginia, and upon the provisions of Section 4 that no distributor in a market in which the provisions of the act are in effect shall buy milk from producers or others for sale within the state, or sell milk within the state unless the distributor is duly licensed under the provisions of the act, and providing further that it shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by the act.

If the act is given this meaning, it is doubtless invalid as a direct and unconstitutional burden on interstate commerce. In Baldwin *v.* G. A. Seelig, 294 U. S. 511, the Supreme Court held that a law or regulation of the State of New York was invalid, as a violation of Article I, Sec. 8, Clause 3 of the Constitution, which prohibited the sale of milk imported from another state unless the price paid therein to the producer was equal to the minimum prescribed by New York for purchases from local producers. We think that the act does not have the meaning attributed it, although the language of the sections under discussion gives some support to the complainants' argument; for when the

act is considered as a whole, including the admonition of Section 14 that no provision of the act shall be construed to apply to foreign or interstate commerce except insofar as the same may be effective pursuant to the United States Constitution, it is seen that the act was not designed to apply to a distributor beyond the state either as to prices or licenses.

Section 3 (j) of the act gives the Commission power to establish markets and to fix prices to be paid to producers by distributors, and wholesale and retail prices to be charged by distributors therein. The term "Market" means any city or town of the commonwealth or two or more cities and towns and surrounding territory designated by the commission as a natural marketing area. Obviously the area designated is to be confined by the Commission to territory within the State of Virginia, and consequently the power of the commission to fix prices in any market is to be enforced only within the state.

Likewise, Section 3 (k) provides that the Commission may require all distributors in any market designated by the commission to be licensed by the commission, so that here also the powers of the commission are restricted to Virginia territory.

Sections I (II) and 4 are broader in their literal significance: but when it is borne in mind that the Dairy in the instant case is not required by the act to be licensed, or to sell at prices fixed by the commission, since it is located in Washington and is not a distributor in any market designated by the commission, it is seen that the act does not forbid High from purchasing milk from the Dairy in the District of Columbia, or fix the price which he shall there pay. Furthermore, even if the plaintiffs correctly construe these provisions of the act, the whole does not fall because Section 16 provides that if any section, clause, sentence or paragraph be declared unconstitutional, the remainder of the act shall not be effected thereby.

The violation of Section 10 of Article 1 of the Constitution complained of is that the act imposes a tax or assessment upon milk imported into Virginia and therefore without the consent of Congress, lays an impost or duty upon

imports not absolutely necessary for executing its inspection laws. The assessment complained of was provided to cover the expenses of the Milk Commission and the local Milk Boards to be appointed to carry out the purposes of the act. The relevant provisions of the act and of the regulations in pursuance thereof are as follows:

SECTION 9. The Milk Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the local milk boards in the form of monthly assessments, and the local milk boards shall pay the assessments so levied. The assessments so levied shall not exceed two cents per hundred pounds of milk handled in each market in which the provisions of this act are in operation.

SECTION 11. (b) Expenses.—The expenses of the milk board, including salaries and/or the per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this act, and including the assessments levied by the State Milk Market Commission, shall be met by an assessment of not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) sold by producers.

REGULATION No. 6. Assessments by the Milk Board. —Each distributor shall pay to the Milk Board all assessments levied on him by the Milk Board (except on that milk which has been purchased from licensed distributors) and shall deduct and pay to the Milk Board all assessments levied by the Board on each producer delivering milk to him. No assessment on producers shall exceed 2¢ per hundred pounds of milk, and no assessment on distributors shall exceed 2¢ per hundred pounds of milk. 1¢ per hundred pounds of milk shall be levied and collected by the Milk Board on all milk received by a distributor and 1¢ per hundred on all milk sold or used by a distributor. Such assessment

> shall be collected on the fifteenth day of each month following the previous delivery period, and delivered to the secretary of the State Milk Commission for deposit to the account of the State of Virginia.

It thus appears that the Milk Commission, in order to cover its own expenses, has directed the levy of an assessment of 1¢ per hundred pounds on milk received by a distributor and 1¢ per hundred pounds on milk sold by a distributor. The local milk board, when set up, would be empowered to levy an additional sum not exceeding the maximum provided in the act to cover its own expenses. The terms of these sections of the act and of Regulation 6, it is urged, would require the dairy in Washington, if licensed as a distributor to handle milk for sale in Virginia, to pay an assessment not exceeding 2¢ per hundred pounds on all milk sold by it to High in Washington and shipped by it in interstate commerce to his stores in Virginia. We need not stop to consider this point for as we have seen, the dairy is not required by the act to take a license.

However, it is also said that even if the dairy be not licensed as a distributor, nevertheless the assessment would bear upon interstate commerce, because High, purchasing all of the milk sold by him in Virginia from the dairy, would be required to pay an assessment thereon of not more than 2¢ per hundred pounds, an assessment he would not have to pay under Regulation 6 if he purchased his milk from a Virginia distributor. Under the law, High would not pay an assessment on milk purchased by him from a licensed distributor in Virginia, because the assessment would have already been paid by the latter; but if High should buy from a producer in Virginia, he would pay for the use of the Milk Commission 1¢ per hundred pounds, and the remainder of the assessment would be deducted from the price paid the producer. Even so, it is difficult to understand how interstate commerce would be burdened or interfered with as a practical matter. Obviously, the sales by the dairy to High in Washington, and the subsequent interstate shipment of the goods would not be curtailed if the dairy, not being subject to Virginia price regulation, could continue to

sell cultured whole milk at its wholesale price of 6¢ per quart as against 11¢ which a Virginia distributor would be required to charge. The assessment of 2¢ per hundred pounds paid by High in Virginia would be exactly the same as that borne by milk produced and distributed in Virginia; and the imposition of the assessment puts the merchandise shipped from Washington on equality with all other merchandise in the state, and constitutes no hindrance to the introduction of the goods from Washington into the state for sale upon the basis of equal competition with the local product.

Furthermore, the assessment is levied upon the goods after they have reached their destination in Virginia and the state has acquired the power to impose a tax or assessment upon them to defray the expenses of the administration of the law. It is well established that there is no burden upon interstate commerce from the imposition of a state tax upon goods which have come to rest in the state at the end of interstate transportation, provided that the state law levies the same tax on all goods of the same sort without regard to their origin. The prohibition contained in Article 1, Section 10, Paragraph 2 of the Constitution forbidding a state to lay imposts or duties on imports or exports is not applicable to such a statute and the validity thereof must be determined by deciding whether it amounts to a regulation of interstate commerce in violation of Article I, Section 8, Paragraph 3 of the Constitution. In Sonneborn Bros. *v.* Cureton, 262 U. S. 506, the Supreme Court was called upon to decide whether oil transported from New York to the warehouse of the taxpayer in Texas and there held for sale in Texas in original packages and subsequently sold in Texas in such packages, might be made the basis of an occupation tax based upon the gross amount of sales in the state, the tax applying to all wholesale dealers in oil engaged in making sales and delivery in Texas. The court said: (508).

> "Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had

> come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

The same doctrine was applied in Wiloil Corp. *v.* Pennsylvania, 294 U. S. 169, 175, where it was said:

> "Our decisions show that, if goods carried from one state have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction. Woodruff *v.* Parham, 8 Wall. 123; Brown *v.* Houston, 114 U. S. 622, 632; American Steel & Wire Co. *v. Speed*, 192 U. S. 500, 519-522; Sonneborn Bros. *v.* Cureton, 262 U. S. 506. And as that rule applies whether the burden falls directly or indirectly (Banker Bros. Co. *v.* Pennsylvania, 222 U. S. 210) it is not material whether the tax is upon the sale and delivery or upon the property."

We find no ground in this case for equitable relief, and therefore the application for temporary restraining order, and for interlocutory and permanent injunctions will be denied, and the bill of complaint will be dismissed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 573

HIGHLAND FARMS DAIRY, INCORPORATED, AND LUTHER W. HIGH,

Appellants,

vs.

J. S. AGNEW, CHAIRMAN; KONE BRUGH AND T. R. SNAVELY, AS MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR APPELLANTS.

PHILIP ROSENFELD,
MORRIS SIMON,
LAWRENCE KOENIGSBERGER,
EUGENE YOUNG,
Attorneys for Appellants.

INDEX.

Subject Index.

	Page
Opinion of the court below	1
Jurisdiction	2
Statement of the case	2
Specification of errors	9
Argument	10
Summary of argument	10
A. No facts existed or exist justifying the enactment of Chapter 357 of the Acts of Assembly, Commonwealth of Virginia, Session 1934, and the Legislature has not found the existence of such facts, but, on the contrary, has undertaken to delegate to the Milk Commission the power of determining the existence *vel non* of such facts as to particular areas within the State	11
B. The Virginia Statute is unconstitutional as constituing an improper delegation of legislative power to an administrative body	15
C. There has not been a suitable legislative investigation or determination of the facts the existence whereof is necessary to sustain the validity of the statute	22
D. The licensing provisions are invalid, as prescribing no standard for the grant, refusal or revocation of licenses	25
E. The enforcement of the statute will be an interference with interstate commerce	26
F. If the statute is void by reason of all or any of the defects herein complained of, it is void in its entirety, notwithstanding the saving clause contained in Section 16	30
Conclusion	32
Appendix "A"—Milk and Cream Act of the Commonwealth of Virginia	33

Table of Cases Cited.

	Page
Block v. *Hirsh*, 256 U. S. 135	11, 22, 24
Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194	11, 22
Borden's Farm Products Co. v. *Ten Eyck*, 297 U. S. 251	23, 24
Bowman v. *Continental Oil Company*, 256 U. S. 642	29
Carter v. *Carter Coal Co.*, 208 U. S. 238	31
Chastleton v. *Sinclair*, 264 U. S. 543	22, 24
Dorchy v. *Kansas*, 264 U. S. 286	31
Eubank v. *Richmond*, 226 U. S. 137	20
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1	22
Field v. *Clark*, 143 U. S. 649	15, 16
Hampton v. *United States*, 276 U. S. 394	15, 16
Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398	11, 22, 25
Lemke v. *Farmers' Grain Company*, 258 U. S. 50	28
Morehead v. *New York ex rel. Tipaldo*, 298 U. S. 587	18, 24
Nebbia v. *New York*, 291 U. S. 502	12, 13, 15, 19, 22, 23
New State Ice Company v. *Liebmann*, 285 U. S. 262	22, 26
Panama Refining Company v. *Ryan*, 293 U. S. 388	16
People v. *Nebbia*, 262 N. Y. 259	24
Railroad Retirement Board v. *Alton Railroad Company*, 295 U. S. 330	31
Schechter v. *United States*, 295 U. S. 495	16, 17, 20
State Board of Equalization of California v. *Young's Market Company* (S. C. U. S.), 81 Adv. Op. 37	27
Tyson et al. v. *Banton*, 273 U. S. 418	22
Wichita R. R. and Light Co. v. *Public Utilities Commission of the State of Kansas*, 260 U. S. 48	15
Williams v. *Standard Oil Co.*, 278 U. S. 235	22
Wilson v. *New*, 243 U. S. 332	11, 22
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522	14, 22
Worthen Company v. *Thomas*, 292 U. S. 426	24

Statutes Cited.

	Page
Act of the General Assembly of Virginia, approved March 29, 1934, Official Volume, Acts of General Assembly of Virginia, 1934, Chapter 357, page 558	2
Section 1	5, 30
2	4
3	4
3 (i)	4, 12, 20
3 (j)	4, 18, 19, 25
3 (k)	5, 25, 26, 32
4	5, 25, 26, 30, 32
6	5, 26
8	5
9	27
11 (B)	27, 30
12	5
13	6
14	6, 29
16	6, 31, 32
17	6
Act of June 16, 1933 (48 Stat. 195, 200), U. S. C. Title 15, Sec. 709	16
Act of June 16, 1933 (48 Stat. 195, 196), U. S. C. Title 15, Sec. 703	17
Constitution of Virginia, Section 53	6
Judicial Code, Section 266, as amended by the Act of February 13, 1925, Chapter 229, Section 1 (43 Stat. 938), U. S. C. Title 28, Section 380	2
New York Milk Control Law	12
Section 312	19
Section 319	24
New York Minimum Wage Law, Section 551 (8)	18

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR APPELLANTS.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court is reported in *Highland Farms Dairy, Inc., et al.* v. *Agnew et al.*, 16 Fed. Supp. 575. It will be found on pages 83 to 113, inclusive, of the Record.

II.

JURISDICTION.

The statutory provision believed to sustain the jurisdiction of this Court upon appeal to review the decree of the District Court is Section 266 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, Section 1 (43 Stat. 938) U. S. C. Title 28, Section 380.

This is a suit in equity wherein the plaintiffs prayed for temporary restraining order and an interlocutory and a permanent injunction enjoining and restraining the defendants, as the Milk Commission of the Commonwealth of Virginia, from enforcing against the plaintiffs the provisions of Chapter 357 of the Acts of the General Assembly of Virginia, Session 1934, p. 558, and the rules and regulations adopted by the defendants as such Milk Commission in the Arlington-Alexandria Sales Area, upon the ground of the unconstitutionality of said statute (R. 1-17). A three-Judge court was convened pursuant to the provisions of Section 266 of the Judicial Code as amended (U. S. C. Tit. 28, Sec. 380) (R. 47-48), which court dismissed the amended bill of complaint (R. 113-114).

The date of the decree sought to be reviewed is October 24, 1936 (R. 113-114).

The petition for appeal was filed (R. 115), and the appeal was allowed (R. 117), on November 6, 1936.

III.

STATEMENT OF THE CASE.

Luther W. High and Highland Farms Dairy, Inc., filed their amended bill in equity in the United States District Court for the Eastern District of Virginia wherein they sought an injunction against the enforcement of the provi-

sions of the Act of the Legislature of the Commohwealth of Virginia, approved March 29, 1934 (Acts of Assembly 1934, Chap. 357, p. 558), commonly known as the Milk and Cream Act, upon the grounds, among others, that said Act was invalid under the Constitution of Virginia, and under the Commerce Clause (Article I, Sec. 8) of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States (R. 1-17). The statute involved is hereinafter set out verbatim as Appendix A to this brief (*infra*, pp. 33-45).

The statute contains a preamble wherein it is recited that the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend, and that the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, resulting in a diminished purchasing power of milk producers, breaking down of the orderly production and marketing of milk and cream and an impairment of the agricultural assets supporting the credit structure of the Commonwealth and the subdivisions thereof; that unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and continue in the production, sale and distribution of milk, and milk and cream products, which impair the dairy industry in the Commonwealth and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to their health and welfare; and that in order to protect the well-being of the people of the Commonwealth and to promote the public welfare, public health and public peace the production, transportation, processing, storage, distribution and sale of milk and cream in the Commonwealth is by the Act declared a business affecting the public peace, health and welfare, which should be super-

vised and controlled in the exercise of the police power of the Commonwealth in the manner thereinafter provided.

Section 2 of the Act creates a State Milk Commission, consisting of three members (*infra*, p. 36), and Section 3 (*infra*, p. 37) declares the Commission to be an instrumentality of the Commonwealth vested with the power, among others, to investigate, supervise, regulate and control all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the State; to define and fix the limit of natural market areas and to exercise its powers in any market after a public hearing has been held for such market, and after the Commission determines that it would be to the public interest that it shall exercise its powers therein. The hearing may be had upon its own motion or upon the application of producers supplying a substantial proportion of the milk consumed in the market or of distributors distributing a substantial proportion of the milk consumed in such market.

The Commission may withdraw the exercise of its powers from any market after a public hearing has been held and the Commission determines that it will be to the public interest to do so and is required so to withdraw from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly (Sec. 3-i).

The Commission may, after public hearing and investigation, fix the prices to be paid producers by distributors and may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market. In determining the reasonableness of the prices to be charged, the Commission is to be guided by the cost of production and distribution, including compliance with sanitary regulations, processing, storage and delivery charges, the prices of other foods, and the welfare of the public (Sec. 3-j).

The Commission may require all distributors in any market to be licensed by the Commission for the purpose of carrying out the provisions of the act (Sec. 3-k).

By Section 1, the term "distributor" is defined to include all persons, whether within or without the Commonwealth, who sell or handle milk for resale therein.

Section 3 (k) empowers the Commission to require all distributors in any market designated by the Commission to be licensed by it for the purpose of carrying out the provisions of the Act, and provides that the Commission may decline to grant a license or may suspend or revoke a license already granted, upon due notice and after hearing, and further provides that the Commission may classify licenses and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the Commonwealth. The action of the Commission in refusing, suspending or revoking a license may be reviewed on appeal by the Supreme Court of Appeals (Sec. 6).

Under Section 4, no distributor in any market in which the act is in effect shall buy milk from producers or others for sale within the State, or sell or distribute milk within the State unless such distributor is duly licensed under the Act. It is unlawful for a distributor to buy milk from or sell milk to a distributor who is not so licensed.

Section 8 provides penalties for failure to comply with any rule, regulation or order of the Commission by way of attachment provisions for contempt in the Hustings Court of the city of Richmond.

Section 12 provides that in the event of violation of any provisions of the Act, in addition to any other remedy, the Commission may apply to any Court of record in the city of Richmond for relief by injunction, without being compelled to allege or prove that any adequate remedy at law does not exist.

Section 13 provides for penalties by fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment for not less than thirty days nor more than one year, or both, for violation of any provision of the act or of any license issued by the Commission, and that each day during which such violation shall continue shall be deemed a separate violation.

Section 14 provides that no provision of the act shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the Constitution and the laws of the United States enacted pursuant thereto.

Section 16 provides that if any section, clause, or sentence or paragraph be declared unconstitutional for any reason the remainder of the act shall not be affected thereby.

Section 17 provides that the period of public emergency during which the act shall be effective shall be until such date as the Legislature may, by joint resolution, designate to be the termination thereof, or if the Legislature be not in session, the date so designated by a proclamation of the Governor, and further recites that, an emergency existing, the act shall be in force from its passage. The last mentioned provision being pursuant to the provisions of Section 53 of the Constitution of Virginia as Amended in 1902.

The plaintiffs in the Court below were Highland Farms Dairy, Incorporated, a Virginia corporation, and Luther W. High, a resident of the District of Columbia, and the defendants were J. S. Agnew, Kone Brugh and T. R. Snavely, as members of the Milk Commission of the Commonwealth of Virginia (R. 49).

The case came on to be heard upon a stipulation of facts, no testimony being taken on behalf of any of the parties (R. 48-58, 113).

It was stipulated that the plaintiff Highland Farms Dairy, Inc., is and since July 1, 1935 has been operating a creamery for the pasteurizing and processing of milk in the District of Columbia, which milk it purchases, chiefly in can lots, under direct contracts from farmers and producers in the District of Columbia, Maryland and Virginia, for delivery to it in the District of Columbia, the transportation thereof being by the farmers or producers, at their cost. About 19½% of its purchases are from farmers or producers in Virginia and substantially all of the milk purchased from farmers or producers in Virginia is produced in the so-called Arlington-Alexandria Production Area (R. 49).

The milk when received from Virginia is mingled with the milk received by the corporate plaintiff from farmers and producers in the District of Columbia and Maryland and is bottled, and the entire output of the milk so bottled is sold by the corporate plaintiff to the plaintiff Luther W. High to be sold at retail by him in Virginia as well as in the District of Columbia and Maryland. High is engaged in the business of operating retail stores for the sale of ice cream, milk and other dairy products in the District of Columbia, Maryland, and Virginia, and in the course and conduct thereof, engages in the business of handling and selling bottled milk in the Arlington-Alexandria Sales Area (R. 51).

By reason of the commingling of the milk at the creamery it is not possible to determine what portion, if any, of the milk delivered to High for sale by him in said Arlington-Alexandria area in Virginia was produced in Virginia (R. 50). The prices at which the corporate plaintiff sells to High (R. 50) and the prices at which High sells at retail (R. 51) are lower than the schedule of retail and wholesale selling prices promulgated by the Milk Commission for the Arlington-Alexandria Sales Area (R. 42).

The plaintiff High purchases in the District of Columbia, under contract, all of the output of bottled milk of the corporate plaintiff, and does not purchase from any other source, while the corporate plaintiff sells all of its output of bottled milk to High (R. 51).

The plaintiff High operates on the so-called "cash and carry" plan, making no deliveries outside of his stores, and selling only for cash, plus a cash deposit on the bottles. The differential between the prices charged by High and the prices charged by other distributors who permit charge accounts and furnish delivery service is an essential factor in his method of competition (R. 52).

No legislative investigation into the condition of the milk industry of Virginia was made or conducted by or at the instance of the General Assembly of Virginia as the basis for the enactment of the statute in question (R. 52-53).

On February 20, 1936, the State Milk Commission met at Richmond to consider the establishment of the milk market for the Arlington-Alexandria area (R. 60A), and thereafter the Milk Commission established the Arlington-Alexandria Milk Market, and, by regulations, required licenses and fixed minimum prices to be charged by distributors therein (R. 38, 39, 42).

The plaintiff Highland Farms Dairy, Inc., has continuously sold bottled milk to the plaintiff High at prices lower than the minimum established by the Milk Commission for the Arlington-Alexandria Milk Area, and the plaintiff High has continuously sold bottled milk to consumers at prices lower than the minimum established therefor (R. 56). The Milk Commission has threatened to invoke against the plaintiff High the remedies by injunction proceedings as provided by the Milk and Cream Act, to restrain him from continuing his business as a milk dealer without having the license thereby required (R. 56-57; 119-120). No action has been taken or threatened against the plaintiff Highland Farms Dairy, Inc. (R. 57).

The Milk Commission has established sixteen marketing areas for the State of Virginia, which are shown on Exhibit 2 attached to the stipulation of facts (R. 60A) by the shaded portions thereof, and, as will appear from said Exhibit, the marketing areas thus established are roughly equal to one-half of the area of the State. These markets were established at various times between June 15, 1934 and May 16, 1936 (Exhibit 2, R. 60A).

On June 2, 1936, a demand was made on the plaintiff High, through the manager of one of his stores in Alexandria (within the Arlington-Alexandria area) that he apply for a distributor's license (R. 64), and on June 6, 1936 there was transmitted to his attorneys a copy of a bill of complaint proposed to be filed, and a proposed decree, to be presented to the Law and Equity Court of Richmond on June 8, 1936. The proposed bill sought to enjoin the plaintiff High and the managers of his four stores in the Arlington-Alexandria milk market from selling milk in said area at less than thirteen cents per quart retail, the minimum price fixed by the Milk Commission (R. 64; 67-70).

IV.

SPECIFICATION OF ERRORS.

(R. 115).

1. The District Court erred in holding that the Act of the General Assembly of Virginia, known as the Milk and Cream Act, approved March 29, 1934, was a proper exercise of the police power of the State.

2. The District Court erred in failing to hold that the said Act was invalid as an improper delegation of legislative power to the Milk Commission.

3. The District Court erred in not holding that the powers conferred upon the Commission involved a denial of equal protection of the laws and a denial of due process in

contravention of the 14th Amendment to the Constitution of the United States.

4. The District Court erred in not holding that the acts and regulations adopted by the Milk Commission were invalid because they constituted an interference on the part of the State with interstate commerce.

V.

ARGUMENT.

Summary of the Argument.

Point A.

No facts existed or exist justifying the enactment of Chapter 357 of the Acts of Assembly, Commonwealth of Virginia, Session 1934, and the Legislature has not found the existence of such facts, but, on the contrary, has undertaken to delegate to the Milk Commission the power of determining the existence *vel non* of such facts as to particular areas within the State.

Point B.

The Virginia statute is unconstitutional as constituting an improper delegation of legislative power to an administrative body.

Point C.

There has not been a suitable legislative investigation or determination of the facts the existence whereof is necessary to sustain the validity of the statute.

Point D.

The licensing provisions are invalid, as prescribing no standard for the grant, refusal or revocation of licenses.

Point E.

The enforcement of the statute will be an interference with interstate commerce.

Point F.

If the statute is void by reason of all or any of the defects herein complained of, it is void in its entirety, notwithstanding the saving clause contained in Section 16.

POINT A.

No Facts Existed or Exist Justifying the Enactment of Chapter 357 of the Acts of Assembly, Commonwealth of Virginia, Session 1934, and the Legislature Has Not Found the Existence of Such Facts, but on the Contrary, Has Undertaken to Delegate to the Milk Commission the Power of Determining the Existence vel non of Such Facts as to Particular Areas Within the State.

Emergency does not create legislative power, but may furnish the occasion for the exercise of power.

Wilson v. *New*, 243 U. S. 332, 348;

Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398, 425.

A declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled to great respect, but a legislative declaration of facts that are material only as the ground for enacting a rule of law, may not be held conclusive by the courts.

Block v. *Hirsh*, 256 U. S. 135, 154.

When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, but this is a presumption of fact and is rebuttable.

Borden's Farm Products v. *Baldwin*, 293 U. S. 194, 209.

Applying the foregoing principles to the case at bar, we find that the Virginia Legislature has passed a statute for

the control of the milk and cream business, containing a preamble intended to show the existence of facts which justify the enactment. But whatever *prima facie* validity the Act might have is negatived by the terms of the Act itself. The Act, although purporting to find the existence of the facts sought to be sufficient to sustain its validity, is not in fact an exercise of such power as the Legislature might have if the existence of these facts were granted, but, on the contrary, provides in Section 3 (i) (*infra*, p. 38) that the Milk Commission shall not exercise its powers in any market until it determines after a hearing, that it will be to the public interest that it so exercise its powers in such market; and a further abdication of legislative power is to be found in the same Section whereby the Commission is given the right to withdraw the exercise of its powers from any market upon a determination that it would be to the public interest so to withdraw, and the provision which requires the Commission to withdraw from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market, acting jointly.

Therein lies an important and vital distinction between the statute here under consideration and the New York statute (Chapter 158 of the Laws of New York, 1933) which was considered and upheld by this Court in *Nebbia* v. *New York*, 291 U. S. 502.

That statute created a milk control board with power "to supervise and regulate the entire milk industry of New York State and a direction to ascertain by investigation and proofs what prices for milk in the several localities and markets of the State will best protect the milk industry in the State, and to fix by official order the maximum and minimum wholesale and retail prices to be charged for milk within the State, wheresoever produced." In sustaining

the validity of the New York statute, this Court said (p. 538):

> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public."

Can it be said that the Legislature of Virginia made any finding or determination of facts, express or implicit, or has expressed a policy, when it is considered that the Commission is sought to be given the power to determine in what portion or portions of the State it shall exercise its powers, with the implication that it may decline to exercise its powers anywhere within the State and is empowered to withdraw from any or all areas in which it shall have undertaken to exercise its powers, and may be required to withdraw from any area at the will of the producers and distributors of a major portion of the milk produced and distributed in such area? How can the Commission determine whether it will be active in, or withdraw from any market except upon a determination by it as to the advisability of such a course—a legislative function? In *Nebbia* v. *New York*, 291 U. S. 502, *supra*, the New York Legislature had said in effect, "Upon the basis of facts which we know and declare, this statute is necessary." The Virginia Legislature, on the other hand, has said in effect, "Perhaps there is need for this legislation in some parts of the State, in all of the State, or in no part of the State; we make no finding and express no opinion on the point. We create

a commission and leave it to that commission to ascertain those facts which are necessary for the validity of regulation of the milk and cream industry, and to determine whether the public interest requires regulation, and leave it to it to determine and express the policy of the State."

In *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, there was involved the validity under the 14th Amendment of a statute of the State of Kansas which created an industrial court for the adjudication of labor disputes in certain industries declared to be effected by a public interest, and to fix wages and other terms for the future conduct of the industry.

The validity of the statute was sought to be upheld on the ground that the power to pass the statute rested upon the existence of a temporary emergency. This Court pointed out the distinction between the existence of an emergency as found by the legislature and as found by an administrative body, and held that whatever might have been the situation if the existence of the emergency had been legislatively determined, a statute which undertook to vest in an administrative body the power to determine whether there was an emergency was not valid under the 14th Amendment. On this point this Court said (p. 542):

> "Whether such danger exists has not been determined by the legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy, owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor."

We submit that the quoted language fits the situation in the case at bar precisely. The Legislature of Virginia has not determined that a danger exists, but has determined that there is a possibility that it exists, in all, none, or some parts of the Commonwealth, and has sought to empower the Milk

Commission to determine that which should be legislatively determined.

POINT B.

The Virginia Statute is Unconstitutional as Constituting an Improper Delegation of Legislative Power to an Administrative Body.

As we have pointed out under Point A, the statute purports to empower the Milk Commission to determine, as to various portions of the Commonwealth, whether it will be to the public interest that the milk industry be regulated in such areas, without prescribing criteria for the guidance and control of the Commission. As the determination of policy is a legislative function, the attempt to delegate it to an administrative body is invalid.

> "In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."
>
> *Wichita R. R. & Light Co.* v. *Public Utilities Commission of the State of Kansas,* 260 U. S. 48, 59.

We concede the principle that the legislature, upon determining the wisdom, policy or expediency of legislation in view of the existence of a certain set of facts, may delegate to the executive or to a commission the power of determining whether such facts exist. Such facts must be objective facts and not a determination of expediency or policy, such consideration being solely for the legislature.

Field v. *Clark,* 143 U. S. 649;

Hampton v. *United States,* 276 U. S. 394.

As was held by this Court in *Nebbia* v. *New York,* 291 U. S. 502, *supra,* the existence of the facts necessary for regulatory legislation of the kind here under consideration

is a question for determination by the legislature; and this finding may be expressed in the statute itself or may be presumed in the absence of a showing to the contrary, but the statute here under consideration purports to invest the Commission with the power of determining the advisability and necessity of milk control in particular areas, not by an ascertainment of objective facts, which it may be assumed would be the same no matter by whom found, but by a determination of the expediency, advisability and necessity of regulation, which are not objective facts, and as to which there may be differences of opinion calling for the exercise of a legislative, as distinguished from an administrative or fact-finding power.

So far from coming under the principle laid down in *Field* v. *Clark*, 143 U. S. 649 and *Hampton* v. *United States*, 276 U. S. 394, *supra*, this statute comes under the condemnation of the decisions of this Court in *Panama Refining Company* v. *Ryan*, 293 U. S. 388 and *Schechter* v. *United States*, 295 U. S. 495.

In *Panama Refining Company* v. *Ryan*, 293 U. S. 388, *supra*, there was involved the validity of Section 9(c) of Title 1 of the Act of Congress of June 16, 1933 (48 Stat. L. 195 U. S. C. Tit. 15, Sec. 709), authorizing the President to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof, produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn by any State law or valid regulation prescribed thereunder by the duly authorized agency of a State, but containing no definition of the circumstances and conditions in which the transportation was to be allowed or prohibited. This Court assumed that the validity of this provision depended upon whether the power of the President was to determine a policy or to carry into effect the policy declared by Congress and said (p. 415):

"Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; and whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."

• • • • • • •

"Section 9(c) does not state whether, or not what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress, in section 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."

For this and other reasons, the law was held invalid as an improper delegation of legislative powers to the Executive.

Schechter Poultry Corporation v. *United States*, 295 U. S. 495, *supra*, involved the validity of the National Industrial Recovery Act of June 16, 1933 (48 Stat. L. 195; U. S. C. Tit. 15, Sec. 703), which purported to give to the President power, upon the application to him by one or more trade or industrial associations or groups, to approve a code or codes of fair competition for such trade or industry if the President found that such associations or groups impose no inequitable restrictions or admission to membership and that such codes are not designed to promote monopolies. After discussing the general principle involved, this Court said (p. 530):

"Accordingly, we look to the statute to see whether Congress has overstepped these limitations, • • •

> whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards has attempted to transfer that function to others."

This Court held the Act unconstitutional as attempting to confer upon the President the legislative function of determination of policy, without the setting up of objective standards.

Section 3 (j) of the Virginia Act provides that

> "The Commission, after public hearing and investigation may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the Commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

There is a distinct analogy between that section and the provisions of Section 551 (8) of the New York minimum wage law which this Court has held to be invalid under the 14th Amendment. (*Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, 605), and which provided that in establishing a minimum fair wage for any service or class of service the Commissioner and the Wage Board may take into account all relevant circumstances affecting the value of the service or class of service rendered and may be guided by like considerations as would guide a Court in a suit for the reasonable value of services rendered where services are rendered

at the request of an employee without contract as to the amount of the wage to be paid, and may consider the wages paid in the State for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards. The New York Court of Appeals had construed the prescribed standard to include cost of living, and this Court, feeling itself bound by that interpretation, held the law to be violative of the 14th Amendment. The Virginia Milk Act does not depend on any judicial interpretation that the cost of living of producers of, and dealers in, milk enters into the prescribed standard, for the statute expressly says that the Commission shall consider, in addition to the cost of production and distribution, the prices of other foods and the welfare of the general public (Sec. 3-j).

The provision that the Commission shall take into consideration also the welfare of the general public, is a standard so broad as to amount to no standard at all. Section 312 of the New York milk law which was upheld in *Nebbia* v. *New York*, 291 U. S. 502, *supra*, provided that the board shall ascertain by investigation and proofs what prices for milk in the several localities and markets of the State and under varying conditions will best protect the milk industry in the State and insure a sufficient quantity of pure and wholesome milk to adults and minors in the State, and shall take into consideration all conditions affecting the milk industry, including the amount necessary to allow a reasonable return to the producer and to the milk dealer. We submit that the New York statute goes to the verge of legislative power and that any statute of like purpose which fails to prescribe standards at least as rigid as those prescribed by the New York law cannot be upheld under the 14th Amendment.

Not only does the statute seek to delegate legislative power to an administrative body, but there is a further dele-

gation of legislative powers to the persons engaged in the industry. We refer to the provision of Section 3 (i) (*infra*, p. 38) that the Commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers measured by volume of milk produced and a majority of the distributors measured by volume of milk distributed in said market, acting jointly. The consequence of this provision could be that two persons, or associations, one producing the major portion of the milk produced in a given area, and the other distributing the major portion thereof, can nullify the statute as to that area by demanding that the Commission withdraw therefrom. This is carrying the delegation of legislative powers almost to its ultimate possible limit.

In *Schechter* v. *United States*, 295 U. S. 495, *supra*, this Court said (p. 537):

> "But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deemed to be wise and beneficent for the rehabilitation and expansion of their trade or industry? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? • • • Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."

Such a delegation of power "unknown to our law" is to be found in the provision which permits persons in the milk and cream industry to decide whether or not a statute of the State shall be enforced in a particular area.

In *Eubank* v. *Richmond*, 226 U. S. 137, there was involved the validity, under the 14th Amendment, of an ordinance of the City of Richmond which provided that whenever the

owners of two-thirds of property abutting on any street should in writing request the committee on streets to establish a building line on the side of the square on which their property fronts, the committee shall establish such line so that the same shall be not less than five feet nor more than thirty feet from the street line, and that no buildings shall be constructed facing such building lines except within the limitation thereof. In holding the statute to be invalid under the 14th Amendment, this Court said (p. 143):

> "It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. • • • One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously."

So in the instant case, conceivably a small group of persons, and even two persons, one controlling a major portion of the milk produced, and the other controlling a major portion of the milk distributed (who might conceivably be one and the same person or association) can nullify an act of the Legislature for any reason or for no reason, or solely in their own interest or for the purpose of creating or maintaining a monopoly.

POINT C.

There Has Not Been a Suitable Legislative Investigation or Determination of the Facts the Existence Whereof is Necessary to Sustain the Validity of the Statute.

This Court has recognized the delicacy of the regulation of businesses not by their nature chargeable with a public interest, and has sustained such legislation where based on the particular facts and circumstances existing at the time of the enactment of the law and of its enforcement.

Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398;
Nebbia v. *New York*, 291 U. S. 502;
Block v. *Hirsh*, 256 U. S. 135;
Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194;
Chastleton v. *Sinclair*, 264 U. S. 543;
Wilson v. *New*, 243 U. S. 332.

Where particular facts and circumstances did not so exist, such legislation has been declared unconstitutional.

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Tyson et al.* v. *Banton*, 273 U. S. 418; and in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, dealing with the attempt of the State to control the manufacture and sale of ice, this Court held that this business was private and not affected with a public interest and likened it to the "business of the grocer, the *dairyman*, the butcher or the baker." (Italics supplied.)

In *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, *supra*, this Court said (p. 537):

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by a state regulation."

In *Nebbia* v. *New York*, 291 U. S. 502, *supra*, this Court commented (p. 516) at length upon the fact that the New York legislation had been passed, after an investigation by a joint legislative committee, which had held 13 public hearings, at which 254 witnesses had testified, 2350 typewritten pages of testimony had been taken and exhibits submitted, and an extensive research program prosecuted by experts and official bodies and employees of the State and municipalities, and the receipt of detailed reports from over 100 distributors of milk, the information contained in which had been analyzed, resulting in a report covering 473 closely printed pages.

In *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 262, this Court referred to its decision in the *Nebbia* case as having held that the 14th Amendment to the Constitution did not prevent the fixing of maximum and minimum prices for milk *in the circumstances existing in the State of New York in 1933.*

No investigation of any kind was made by the Legislature of Virginia, or by any official body prior to the passage of the statute (R. 53). The stipulation of facts shows (R. 53) that the bill which subsequently became the Act was introduced in the House of Delegates on the morning of March 10, 1934, accompanied by a letter from the Governor (R. 61) bearing the same date, in which he transmitted a draft of the bill and urged its passage; the bill was reported to the Committee on Agriculture and Mining, which was immediately discharged from consideration thereof, printings and constitutional readings were waived and the bill was adopted by the House and sent to the Senate on the same morning. The Senate on the same day referred the bill to the Committee on Agriculture and Mining, immediately discharged the Committee from consideration thereof, dispensed with the constitutional readings and

enacted the same on the afternoon of the same day upon which the bill had been introduced (R. 53). The Act was approved by the Governor on March 29, 1934.

We submit that this hurried enactment of the statute, to say the least, coupled with the terms of the Act itself, which show that the Legislature had not determined any policy except the policy of permitting the Milk Commission to determine its policy, are sufficient to deprive the statute of whatever presumption in favor of its validity might otherwise exist.

The statute may not be upheld as emergency legislation, as it does not cover, and does not purport to cover any emergency situation, but is permanent legislation.

The New York Milk Act became effective immediately throughout the State and its life was limited to a little less than one year (sec. 319). The Virginia statute becomes effective, if at all, at the will of the Commission, and it has no definite time limitation.

The New York Milk Act was enacted as and "was adopted to meet an emergency", *People* v. *Nebbia*, 262 N. Y. 259; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, *supra;* rent legislation has been upheld as emergency legislation. "A limit in time to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change", *Block* v. *Hirsh*, 256 U. S. 135; *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, *supra*. On the other hand the New York minimum wage law was denounced by this Court as violative of the 14th Amendment for the reason, among others, that it was not emergency legislation, but was intended to express the permanent policy of the State of New York. *Morehead* v. *New York ex rel, Tipaldo*, 298 U. S. 587, 615 (*supra*).

In *Worthen & Co.* v. *Thomas*, 292 U. S. 426, this Court held that a statute of Arkansas exempting from seizure

under judicial process moneys paid or payable under liability and disability insurance policies was, as to creditors existing at the time of the enactment of the statute, invalid under the Fourteenth Amendment. The Court distinguished the statute involved in that case from the Minnesota mortgage moratorium law which had been upheld in the *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, *supra*, upon the ground that the Minnesota mortgage moratorium law had been enacted in view of an existing emergency and was temporary in character, whereas the Arkansas statute was permanent legislation, saying (p. 434):

> "• • • The relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the act contains no limitations as to time, amount, circumstances or need."

POINT D.

The Licensing Provisions Are Invalid, as Prescribing No Standard for the Grant, Refusal or Revocation of Licenses.

Section 3 (k) (*infra*, p. 40) provides that the Commission may require all distributors in any market designated by it to be licensed by the Commission for the purpose of carrying out the provisions of the act, and that the Commission may decline to grant a license or may suspend or revoke a license already granted, upon due notice and after a hearing; and Section 4 (*infra*, p. 41) prohibits distributors from buying milk from any source and from selling it within the Commonwealth unless they have been licensed. Not a word will be found in the statute which lays down any rules for the guidance of the Commission in the granting, withholding or revocation of licenses; the power is apparently given to the Commission to grant, withhold or revoke licenses at will, for no reason, or for any reason, or because it considers that the services of a particular dis-

tributor in a given area are not needed, which last-named consideration would be invalid under the decision of this Court in *New State Ice Company* v. *Liebmann*, 285 U. S. 262, *supra*.

Section 6 (*infra*, p. 41) provides that any order of the Commission in refusing to issue a license or suspending or revoking a license may be reviewed on appeal to the Supreme Court of Appeals. But this provision is wholly useless if the provisions of Section 3 (k) are given effect, because that Section gives the Commission an unlimited and unrestrained power in regard to licenses. Consequently no appeal to the Court could be effective because it could in no case be pointed out that the action of the Commission contravenes any statutory prescription or limitation of its powers, as there are no such prescriptions or limitations.

POINT E.

The Enforcement of the Statute Will be an Interference With Interstate Commerce.

The statute provides (Section 4) (*infra*, p. 41) that all distributors whose milk is sold within the Commonwealth of Virginia must be licensed, and Section 1 defines distributors as including among others, persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia. As thus worded, the statute applies to persons, such as the plaintiff Highland Farms Dairy, Inc., who buy milk in Virginia for delivery in the District of Columbia, or some other State, for ultimate resale as fluid milk in the Commonwealth of Virginia, and to persons in the situation of the plaintiff High, who purchase in the District of Columbia for resale in Virginia. The restriction is not only on the sale of milk in Virginia, but Section 4 expressly says that no distributor shall buy milk from producers or others, for sale within the Commonwealth, unless such distributor is licensed.

This makes the act of a dealer licensed under the act in buying milk in interstate commerce unlawful unless the person from whom the milk is purchased is also licensed.

Section 9 of the act (*infra*, p. 42) provides that the Milk Commission shall collect the money required for its budget from the local milk boards in the form of monthly assessments, which shall not exceed 2¢ per hundred pounds of milk handled in each market in which the provisions of the act are in operation; and Section 11 (b) (*infra*, p. 43) provides that the expenses of the milk board, including the expenses levied by the State Milk Market Commission, shall be met by an assessment of not over 2¢ per hundred pounds of milk and/or cream handled by distributors, and not over 2¢ per hundred pounds of milk and/or cream sold by producers, and that all assessments shall be paid at the time the distributors pay the producers for the milk. It thus appears that this tax or so-called assessment is a direct burden on interstate commerce in those cases where Virginia distributors purchase their milk from out-of-State producers. The assessment, it will be noted, is not based on sales by the distributor within the State, but on purchases thereof from producers, whether within or without the State. This constitutes a tax on interstate commerce, so far as purchases from out-of-State producers are concerned.

In *State Board of Equalization of California* v. *Young's Market Company*, decided November 9, 1936, 81 Advance Opinions 37, this Court had under consideration a statute of California under which wholesale dealers in beer importing the same into California from other States were required to pay a license fee of $50. The validity of the statute was upheld by reason of the provisions of the 21st Amendment, Section 2, whereof prohibits the transportation or importation into any State, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof. The sig-

nificance of the decision of this Court in that case is apparent from the following quotation therefrom:

> "Prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege [importation of beer]. The imposition would have been avoided, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any State except as Congress may otherwise provide. The exaction of a fee for the privilege of importation would not, before the Twenty-first Amendment, have been permissible even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business."

In *Lemke* v. *Farmers' Grain Company*, 258 U. S. 50, this Court held unconstitutional a North Dakota statute requiring purchasers of grain to obtain a license from a State inspector and to act under a defined system of grading, inspection and weighing, and subjecting the prices paid and profits made to regulation by the State inspector. The Court said (p. 59):

> "• • • the statute denies the privilege of engaging in interstate commerce except to dealers licensed by state authority, and provides a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce"
>
> • • • • • • •
>
> "It is alleged that such legislation is in the interest of the grain growers, and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach

upon the field of interstate commerce, placed by the Constitution under Federal control."

Nor is the act saved from invalidity in this regard by Section 14 (*infra*, p. 44), which provides that no provision thereof shall apply or be construed to apply to foreign or interstate commerce except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto. If this statute be so construed as to exempt from the assessment purchases made by Virginia distributors from out of State producers, we then have an inequality and an advantage enjoyed by distributors who purchase from sources out of the State over those distributors who make their purchases within the State, thus violating that clause of the 14th Amendment which prohibits the State from denying to any person within its jurisdiction the equal protection of the laws.

In *Bowman* v. *Continental Oil Company*, 256 U. S. 642, in which this Court held void a statute of New Mexico imposing upon distributors of gasoline an excise of 2¢ for each gallon sold and an annual license tax of $50.00, the State Attorney General averred that the State and its officers charged with enforcement of the law, did not construe the act as affecting interstate commerce, and had no purpose or intention to enforce it so as to do so. The Court dismissed this contention of the defendant, saying (p. 648):

"No doubt the State might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the State has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as ap-

> pears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence it cannot be enforced at all."

It is submitted, therefore, that the disavowal by the Milk Commission of intent to enforce the assessment against interstate business (R. 57) does not avoid a burden upon interstate commerce, since the assessment, if imposed at all, is required by the terms (Section 11 (b)) the Milk Act itself to be imposed, and paid, before the milk is sold to the consumer. It follows therefore, that the assessment cannot be imposed at all in this case without interfering with interstate commerce.

Point F

If the Statute is Void by Reason of All or Any of the Defects Herein Complained of, it is Void in its Entirety, Notwithstanding the Saving Clause Contained in Section 16.

Section 4 (*infra*, p. 41) provides among other things, that it shall be unlawful for a distributor to buy milk from a distributor who is not licensed as required by the act. The term "distributor" is defined by Section 1 (II) to include persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia. Applying this portion of the statute to the plaintiffs in this suit, we find that High, who is a distributor within the State of Virginia, may not without violating the statute and incurring the penalties thereby prescribed, purchase milk in the District of Columbia from the plaintiff Highland Farms Dairy, because under the statutory definition Highland Farms Dairy is a distributor which handles milk for resale as fluid milk in the Common-

wealth of Virginia, and it is not licensed. This is not only a restriction upon interstate commerce, but is an absolute prohibition thereof if one of the parties to the action, a nonresident of the State and not engaged in business therein, has failed to obtain a license under the laws of the State.

Section 16 provides that if any section, clause, sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby. Where the statute contains such a provision, its effect is to reverse the presumption that the Legislature intends an act to be effective as an entirety and that if any provision thereof be unconstitutional, the remaining portions fall with it, and to create a presumption of separability, thereby shifting the burden to those who assail the statute to show its inseparability. Under either rule the determination is reached by applying the test, What was the intent of the law makers?

Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of statutory construction and of legislative intent to the determination of which the statutory provision becomes an aid. But it is an aid merely; not an inexorable command. *Dorchy* v. *Kansas*, 264 U. S. 286, 290.

The presumption in favor of separability does not authorize the Court to give the statute "an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330.

> "The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and to uphold another part as separable they must not be mutually dependent upon one another."
>
> *Carter* v. *Carter Coal Co.*, 208 U. S. 238, 312.

We submit that the statute here under consideration is so drawn that if those portions of it to which we have herein

directed the attention of the Court are invalid, the whole statute must necessarily fall, since the whole statute deals with one subject and undertakes to prescribe a comprehensive plan for the regulation of the milk industry.

If, therefore, the provisions as to licensing fail, the whole act must fail. Section 3 (k) (*infra*, p. 40) provides that the Commission may require all distributors in any market designated by the Commission to be licensed by the Commission *for the purpose of carrying out the provisions of the act*, and may issue licenses to distributors to process or store, or sell milk to a particular city or village or to a particular market or markets; and Section 4 (*infra*, p. 41) prohibits distributors in markets in which the provisions of the act are in effect to buy milk for sale within the Commonwealth unless such distributor is licensed, and makes it unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed, and makes it unlawful for any distributor to deal in or handle milk if he has reason to believe it has previously been dealt in or handled in violation of the act. It will thus be seen that the licensing feature is the mechanism by which the statute is to be made effective. If the provisions in regard to the licensing are stricken from the act, the act becomes a futility in its entirety, and Section 16 cannot save it.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that the decree of the Court below should be reversed and that the cause should be remanded with directions to enter a decree in accordance with the prayers of the amended bill.

Respectfully submitted,

PHILIP ROSENFELD,
MORRIS SIMON,
LAWRENCE KOENIGSBERGER,
EUGENE YOUNG,
Attorneys for Appellants.

APPENDIX A.

Milk and Cream Act.

CHAP. 357.—AN ACT to provide for the supervision, regulation and control of the production, processing, transportation, storage, distribution, and sale of milk and cream; to create a Milk Commission and local milk boards and to define and provide for the functions, duties and powers thereof; to provide for the appointment, suspension, removal, compensation, costs, and expenses of such commission and boards and the members, officers, agents and employees thereof; to provide for licensing processors, bottlers, wholesalers, distributors, and retailers of milk and cream, or either; to provide for the raising of funds for the administration of this act and to provide for the disposition of revenue collected hereunder and to impose penalties for violation of the provisions of this act. [H B 396]

Approved March 29, 1934.

Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political subdivisions thereof; and

Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the

health and welfare of the inhabitants of the Commonwealth; and

Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; now, therefore,

1. Be it enacted by the General Assembly of Virginia, as follows:

Section 1. Definitions.—As used in this act, unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

"Person" means any person, firm, corporation or association.

"Commission" means the milk commission created by this act.

"Distributor" means any of the following persons engaged in the business of distributing, marketing, or in any manner handling fluid milk, in whole or in part, in fluid form for consumption in the Commonwealth of Virginia:

I. Persons, irrespective of whether any such person is a producer:

(a) who pasteurize or bottle milk or process milk into fluid milk;

(b) who sell and/or market fluid milk at wholesale or retail

(1) to hotels, restaurants, stores or other establishments for consumption on the premises

(2) to stores or other establishments for resale, or

(3) to consumers;

(c) who operate stores or other establishments for the sale of fluid milk at retail for consumption off the premises.

II. Persons wherever located or operating, whether within or without the Commonwealth of Virginia, who pur-

chase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia.

"Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk for sale as fluid milk in the Commonwealth of Virginia.

"Producer-distributor" means a distributor who handles only milk produced by himself.

"Consumer" means any person, other than a milk distributor who purchases milk for human consumption.

"Market" means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area.

"Licensee" means a licensed milk distributor.

"Milk" means the clean lacteal secretion obtained by the complete milking of one or more healthy cows properly fed, housed and kept; including milk that is cooled, pasteurized, standarized or otherwise processed with a view of selling it as fluid milk, cream, buttermilk (either cultured or natural buttermilk, and including cultured whole milk in its several trade forms) and skimmed milk; said term excludes the lacteal secretion of one or more dairy animals where lacteal secretion is sold or intended to be sold for any other purpose..

"Subsidiary" means any person of, or over whom or which a distributor or an affiliate of a distributor has, or several distributors collectively have, either directly or indirectly, actual or legal control, whether by stock ownership or in any other manner.

"Affiliate" means any person and/or subsidiary thereof, who has, either directly or indirectly, actual or legal control, over a distributor, whether by stock ownership or in any other manner.

"Board" means the local agency authorized by this act to administer the operation of the act in each market area operating under the provisions of this act, to be known as the "milk board" of the particular market area in which it functions.

"Books and records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence,

or other data, pertaining to the business of the person in question.

"Health authorities" includes the State Board of Health, the Virginia Dairy and Food Division of the State Department of Agriculture and Immigration and the Director thereof, and the local health authorities.

"Sanitary regulations" includes all laws and ordinances relating to the production, handling, transportation, distribution and sale of milk and, so far as applicable thereto, the State sanitary code and lawful regulations adopted by the dairy and food divisions, or by the board of health of any county or municipality.

Section 2. Milk Commission.—(a) There is hereby created a Milk Commission, consisting of three members, two of whom shall be producers of milk who are not directly or indirectly engaged in the distribution thereof, and the third member shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom, who shall be appointed by the Governor of Virginia to hold office at the pleasure of the Governor and may be removed at any time by the Governor. Any vacancies occurring shall be filled by appointment by the Governor. One member of said commission shall act as chairman, as designated by the Governor. The technical and other services for such commission shall be performed, so far as practicable, by forces and officers in the Department of Agriculture and Immigration, the Virginia Agricultural Extension Division of the Virginia Agricultural Experiment Station, without additional compensation. The Milk Commission may appoint and, at pleasure, remove the secretary of the Milk Commission and any such additional technical and other assistants and employees as may be necessary to carry out the provisions of this act, and to prescribe their powers and duties.

(b) The members of the Milk Commission shall be paid each the sum of ten dollars per day for each day actually spent in the performance of their official duties, plus their actual and necessary expenses.

(c) The commission shall fix the compensation of the secretary of the Milk Commission and other employees.

(d) The secretary shall, subject to the limitations herein contained and the rules and regulations of the commission, enforce the provisions of this act, but no official act shall be taken, rule or regulation be promulgated, or official order made or enforced, with respect to the provisions of this act, without the approval of the majority of the members of the commission.

(e) The principal offices of the commission shall be in the city of Richmond, in rooms assigned by the Director of the Division of Grounds and Buildings.

(f) Two members of the commission shall constitute a quorum.

Section 3. Powers.—The commission is hereby declared to be an instrumentality of the Commonwealth, vested with power:

(a) To confer and co-operate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, with respect to milk coming into the Commonwealth and going out of the Commonwealth in interstate commerce, with a view of accomplishing the purposes of this act, and to enter into a compact or compacts for such uniform system of milk control.

(b) To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia.

(c) To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

(d) To act as mediator or arbiter in any controversial issue that may arise among or between milk producers and distributors, as between themselves, or that may exist between them as groups.

(e) To examine into the business, books and accounts of any milk producer, association of producers or milk distributors, their affiliates or subsidiaries; to issue subpoenas

to milk producers, associations of producers, and milk distributors, and to require them to produce their records, books and accounts; to subpoena any other person from whom information is desired.

(f) To take depositions of witnesses within, or without, the Commonwealth. Any member of the commission, or any employee designated by the commission, may administer oaths to witnesses and sign and issue subpoenas.

(g) To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the purposes of this act. Every rule or order of the commission shall be posted for inspection in the main office of the commission, and a certified copy filed in the office of the Commissioner of Agriculture. An order, applying only to a person or persons named therein, shall be served on the person or persons affected. An order, herein required to be served, shall be served by personal delivery of a certified copy, or by mailing a certified copy in a sealed envelope, with postage prepaid, to each person affected thereby; or, in the case of a corporation, to any officer or agent of the corporation upon whom legal process may be served. The posting in the main office of the commission of any rule and of any order, not herein required to be served, and such filing in the office of the Commissioner of Agriculture, shall constitute due and sufficient notice to all persons affected by such rule or order.

(h) The operation and effect of any provision of this act conferring a general power upon the commission shall not be impaired or qualified by the granting to the commission by this act of a specific power or powers.

(i) The commission shall not exercise its powers in any market until a public hearing has been held for such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market. The commission may, on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of the Commonwealth of Virginia, supplying

in the judgment of the commission a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors, distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission may withdraw the exercise of its powers from any market after a public hearing has been held for such market, and the commission determines that it will be to the public interest to withdraw the exercise of its powers from such market. The commission may on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of Virginia, supplying in the judgment of the commission, a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly.

(j) The commission, after public hearing and investigation, may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk.

In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public.

(k) The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the Commonwealth.

(l) Any member of the commission, or employee designated for the purpose, shall have access to, and may enter at all reasonable hours, all places where milk is stored, bottled or manufactured into food products. Any member of this board, or designated employee shall have the power to inspect books and records in any place within the Commonwealth for the purpose of ascertaining facts to enable the board to administer this act, and all such information shall be confidential, unless the parties concerned agree to its being given out. The commission may combine such information for any market or markets and make it public.

(m) The commission may define what shall constitute a natural market area and define and fix the limits of the milkshed or territorial area within which milk shall be produced to supply any such market area; provided, that producers, producer-distributors, or their successors now shipping milk to any market may continue so to do until they voluntarily discontinue shipping to the designated milk market.

(n) The commission may delegate such of the powers given it by this act as it sees fit to the milk board in any

particular market area, for the purpose of carrying out the provisions of this act within said market area.

(o) Each licensee shall, from time to time, as required by the commission, furnish to the commission verified reports containing such information as the commission may require.

Section 4. No distributor in a market in which the provisions of this act are in effect shall buy milk from producers, or others, for sale within the Commonwealth, or sell or distribute milk within the Commonwealth, unless such distributor is duly licensed under the provisions of this act. It shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by this act. It shall be unlawful for any distributor to deal in, or handle milk if such distributor has reason to believe it has previously been dealt in, or handled, in violation of the terms and provisions of this act.

Section 5. An application to the commission for a license to operate as a distributor shall be made by mail or otherwise within five days after the provisions of this act become effective in a market, and as to any distributor thereafter beginning business, before such distributor shall begin such business therein. The application shall be made on blanks furnished by the commission for the purpose.

Section 6. Any order of the commission in refusing to issue a license, or suspending or revoking a license, may be reviewed on appeal to the Supreme Court of Appeals.

Section 7. The licenses required by this act shall be in addition to any other licenses required by existing laws of the Commonwealth of Virginia or by any municipal ordinance. Nothing in this act shall be construed to conflict with or repeal any laws now in force in the Commonwealth of Virginia relating to any board of health or sanitary code now in force in this Commonwealth or in any municipality thereof, nor any municipal ordinances relating to the inspection, grading, production, sale or distribution of milk.

Section 8. Any person failing or refusing to comply with any subpoena issued by the commission or pursuant to its

authority, shall be deemed guilty of a misdemeanor, and upon conviction, may be punished by a fine not exceeding one hundred dollars or by imprisonment not exceeding ninety days, or both, and each day during which such violation shall continue shall be deemed a separate offense. In the event any person shall fail to comply with any rule, regulation or order of the commission, or obey any subpoena issued thereby, or in the event of the refusal of any witness to testify to any matter concerning which he lawfully may be interrogated by the commission or its representative, it shall be the duty of the hustings court of the city of Richmond, or judge thereof, upon application of the commission, to compel obedience by attachment proceeding for contempt as in the case of disobedience of the requirements of a subpoena issued from said court, refusal to testify therein, or disobedience of an order or decree of such court. The proceedings herein authorized in the hustings court to compel obedience shall be in addition to the provisions of this section defining what shall constitute a misdemeanor and providing and prescribing the punishment therefor.

Section 9. The Milk Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the local milk boards in the form of monthly assessments, and the local milk boards shall pay the assessments so levied. The assessments so levied shall not exceed two cents per hundred pounds of milk handled in each market in which the provisions of this act are in operation.

Section 10. All receipts from assessments paid under this act shall be paid by the commission to the State Treasurer and shall be placed by the State Treasurer in the general fund to the credit of an account to be known as the "Milk Commission account" and such amount as may be necessary, and no more, hereby is appropriated out of such Milk Commission account for the payment of all expenses incurred by the Milk Commission in administering and enforcing this act.

Section 11. Local milk boards.—(a) Members. For the purpose of securing the benefits of this act, in any market area, the producers and distributors and producer-distributors in that market area shall establish a milk board of five members to carry out the provisions of this act in conjunction with the State Milk Commission. Each local milk board shall be composed of two representatives of the producers supplying milk to the market, one of whom shall be named by the producers' co-operative marketing association operating in the market, and in markets where the producers' co-operative market association handles the selling of fifty per centum or more of the milk, the association shall have the right to name both representatives of the producers on the milk board; and two representatives of the distributors operating in the market. In markets where producer-distributors handle fifty per cent or more of the milk used in the market the Milk Commission shall determine the representation of the producers, the producer-distributors and distributors on the milk board on a basis fair to all parties.

The Milk Commission shall appoint the fifth member of the milk board to represent the consumers and the public interest, who shall serve as chairman of the board. The representative of the consumers and the public interest shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom.

(b) Expenses. The expenses of the milk board, including salaries and/or the per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this act, and including the assessments levied by the State Milk Market Commission, shall be met by an assessment of not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) sold by producers. The exact amount of each monthly or semi-monthly assessment shall be determined by the milk board

as necessary to cover its expenses. All assessments shall be paid at the time the distributors pay the producers for the milk. All officers and employees of the milk board who handle funds of the board, or who sign or countersign checks upon such funds, shall severally give bond in such amount and with such sureties as shall be determined by the milk board. The cost of such bonds shall be paid by the milk board and the milk board shall determine the amount and sufficiency of such bonds.

(c) Powers. The milk board shall perform such functions as the Milk Commission shall delegate to it.

Section 12. In the event of violation of any provision of this act, in addition to any other remedy, the commission may apply to any court of record in the city of Richmond for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist.

Section 13. Penalties.—Any person violating any provision of this act or of any license issued by the commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, and each day during which such violation shall continue shall be deemed a separate violation. Prosecutions for violating the provisions of this act shall be instituted by the Commonwealth's attorney of the Commonwealth, or otherwise, in any county or city of the Commonwealth of Virginia in which the provisions of this act are in effect.

Section 14. Saving clause.—No provision of this act shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

Secion 15. Conflicting laws.—The making of marketing agreements between producers' co-operative marketing as-

sociations and distributors and producer-distributors under the provisions of this act shall not be deemed a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily nor shall the marketing contract or agreements between the association and the distributors and producer-distributors, or any agreements authorized in this act, be considered illegal or in restraint of trade. All laws or parts of laws in conflict with the provisions of this act are hereby repealed to the extent necessary for the full operation of this act.

Section 16. Constitutionality.—If any section, clause, or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby.

Section 17. Termination.—The period of public emergency during which this act shall be effective shall be until such date as the Legislature may, by joint resolution, designate to be the termination thereof, or if the Legislature be not in session the date so designated by a proclamation of the Governor.

2. An emergency existing, this act shall be in force from its passage.

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CHARLES ELMORE CR
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Supreme Court of the United States

OCTOBER TERM, 1936

No. 573

HIGHLAND FARMS DAIRY, INCORPORATED, and LUTHER W. HIGH, *Appellants*,

vs.

J. S. AGNEW, CHAIRMAN; KONE BRUGH and T. R. SNAVELEY, as MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA, *Appellees.*

Brief of Appellees

ABRAM P. STAPLES,
Attorney General for Virginia.
EDWIN H. GIBSON,
Assistant Attorney General for Virginia.
JOHN S. BARBOUR,
Counsel for Appellees.

Counsel:
ABRAM P. STAPLES,
Attorney General.
EDWIN H. GIBSON,
Assistant Attorney General.
JOHN S. BARBOUR,
Counsel for Appellees.

LEWIS PRINTING CO., INC., RICHMOND, VA.

Subject Index

		Page
I.	JURISDICTION	1
II.	STATEMENT OF THE CASE	1-12
III.	SUMMARY OF ARGUMENT	12
IV.	ARGUMENT	14
POINT 1.	THE VIRGINIA LEGISLATURE HAS FOUND AND DECLARED THE EXISTENCE OF FACTS JUSTIFYING THE ENACTMENT OF THE LAW AND THE DELEGATION OF THE POWERS THEREBY MADE TO ADMINISTRATIVE BOARDS	14
POINT 2.	THE VIRGINIA STATUTE DOES NOT UNCONSTITUTIONALLY DELEGATE IMPROPER POWER TO AN ADMINISTRATIVE BODY	32
POINT 3.	THE LICENSING PROVISIONS ARE VALID	37
POINT 4.	THE ENFORCEMENT OF THE STATUTE WILL NOT CONSTITUTE A BURDEN UPON OR UNLAWFUL INTERFERENCE WITH INTERSTATE COMMERCE	41
POINT 5.	SECTIONS 14 AND 16 OF THE ACT NEGATIVE ANY CONSTRUCTION OF THE ACT WHICH WOULD RENDER IT UNCONSTITUTIONAL	68

Table of Cases

	Page
Aetna Ins. Co. v. Hyde, 275 U. S. 440	20
American Exp. Co. v. Iowa, 196 U. S. 133	55
American Steel and Wire Co. v. Speed, 192 U. S. 522	46, 61, 65
Baldwin v. Seelig, 294 U. S. 511	64
Banker Bros. Co. v. Pennsylvania, 222 U. S. 210	61
Bayside Fish & Flour Co. v. Gentry, 297 U. S. 422	51
Block v. Hirsh, 256 U. S. 135	16
Bordens Farm Products Co. v. Baldwin, 293 U. S. 194	19, 52
Bowman v. Continental Oil Co., 256 U. S. 642	61, 62, 70
Brown v. Houston, 114 U. S. 622	46, 47, 53, 61
Brown v. Maryland, 12 Wheat 419	44, 45, 64
Cont. Baking Co. v. Woodring, 286 U. S. 352	40
Douglas v. Noble, 261 U. S. 165	38
Eubank v. Richmond, 226 U. S. 137	35
Field v. Clark, 143 U. S. 649	33
Hampton v. U. S., 276 U. S. 394	33
Haskill v. Kansas Natl. Gas Company, 224 U. S. 217	55
Hegeman Farms v. Baldwin, 293 U. S. 163	52
Hendrick v. Maryland, 235 U. S. 610	48
Hinson v. Lott, 8 Wall. 148	45, 66
Hygrade Prov. Co. v. Sherman, 266 U. S. 497	51
Lehmann v. State Board of Public Accountancy, 263 U. S. 394	38, 40
Lemke v. Farmers Grain Co. 258 U. S. 50	61, 65
Lieberman v. Van De Carr, 199 U. S. 552	38, 39
Matson v. State Board, 297 U. S. 441	57
Mintz v. Baldwin, 269 U. S. 346	49
Nebbia v. New York, 291 U. S. 502	17, 25, 52
Packer Corporation v. Utah, 285 U. S. 105	56

Page

Pacific States Box, etc. Co. v. White, 296 U. S. 176 ..... 18, 20, 32, 33, 35
Pipe Line Cases, 234 U. S. 548 55
P. U. C. v. Landon, 249 U. S. 329 53
Pure Oil Co. v. Minnesota, 248 U. S. 158 68
Raley & Bros. v. Richardson, 264 U. S. 157 57
Ratterman v. Western Union, 127 U. S. 411 63
Rearick v. Penn., 203 U. S. 507 55
Reynolds v. Milk Commission, 163 Va. 957 ..... 20, 33, 38, 41
Schechter Poultry v. United States, 295 U. S. 495 ..... 33, 52
Smith v. Alabama, 127 U. S. 465 49
Smith v. Cahoon, 283 U. S. 553 40
Sonneborn Brothers v. Keeling, 262 U. S. 506 ..... 42, 61, 65
State Board v. Young, 81 Adv. Op. 37 ..... 61, 65
Texas v. Brown, 258 U. S. 466 ..... 65, 67
Turner v. Maryland, 107 U. S. 38 18
West v. Kansas Natl. Gas Co., 221 U. S. 229 55
Wichita R. R. & L. Co. v. P. U. Co., 260 U. S. 48 ..... 33, 34
Willoil Corp. v. Penn. 294 U. S. 169 61
Wilson v. New, 243 U. S. 332 14
Woodruff v. Parham, 8 Wall. 123 ..... 45, 46, 47, 61
Yick v. Hopkins, 118 U. S. 356 38

Supreme Court of the United States

OCTOBER TERM, 1936

No. 573

HIGHLAND FARMS DAIRY, INCORPORATED, and LUTHER W. HIGH, *Appellants,*

vs.

J. S. AGNEW, CHAIRMAN; KONE BRUGH and T. R. SNAVELEY, as MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA, *Appellees.*

Brief of Appellees

I

JURISDICTION

No exception is taken to the jurisdiction of this court insofar as the case involves any Federal question, as it does.

II

STATEMENT OF THE CASE

The Highland Farms Dairy, Incorporated, one of the plaintiffs below and one of the appellants here, is a cor-

poration incorporated under the laws of the State of Virginia, but actually transacts no business in the State of Virginia. All of its activities are in the District of Columbia (see Stipulation R. p. 49, pargs. 1 and 5); while it purchases milk produced in Virginia all deliveries of milk so purchased are made in the District of Columbia by the producers. All milk sold by it is sold and delivered to the other plaintiff, Luther W. High, who "purchases in the District of Columbia under contracts all of the output of bottled milk of the said plaintiff, Highland Farms Dairy, Incorporated" (see Stipulation R. p. 51, par. 10); Luther W. High transports this milk or parts of it, to the Arlington-Alexandria Milk Area in Virginia, and sells at retail to the general public from stores maintained therein for that purpose (see Amended Bill, par. 9, R. p. 3).

The General Assembly of Virginia by act approved March 29, 1934 (Acts of 1934, chapter 357, page 558, Virginia Code 1936 Annotated, sections 1211 (w) to 1211 (m.m), inclusive, a copy of which is in the printed record (hh. 18-30) and is appended to the appellant's brief, pp. 33 to 45, inclusive), commonly known as the "Milk and Cream Act," provided for the regulation and control of the production and sale of milk in Virginia entitled:

> "AN ACT to provide for the supervision, regulation and control of the production, processing, transportation, storage, distribution, and sale of milk and cream; to create a Milk Commission and local milk boards and to define and provide for the functions, duties and powers thereof; to provide for the appointment, suspension, removal, compensation, costs, and expenses of such commission and boards and the members, officers, agents, and em-

ployees thereof; to provide for licensing processors, bottlers, wholesalers, distributors, and retailers of milk and cream, or either; to provide for the raising of funds for the administration of this act and to provide for the disposition of revenue collected hereunder and to impose penalties for violation of the provisions of this act."

The act recited and declared that:

"The production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth; and *local political subdivisions thereof;* and * * * unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth * * * and in order to promote the well being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream *in the Commonwealth of Virginia,* is hereby

declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; * * *." (Italics supplied.)

(Note) Wherever italics are used for emphasis in this brief they are supplied unless otherwise indicated.

Section 2 thereof created a Commission of three members, which by section 3 was declared to be an instrumentality of the Commonwealth, vested with the powers therein conferred. The technical and other services for so far as practicable, of the forces and officers in the Department of Agriculture and Immigration of the Virginia Agricultural Extension Division of the Virginia Agricultural Experiment Station were put at the disposal of the Commission officers of which section 3 sets out in detail the powers of the Commission, amongst others:

(a) "To confer and to cooperate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, * * * and with a view of accomplishing the purposes of this Act * * *."

(b) "To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk *in* the Commonwealth of Virginia."

(c) "To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption *within* the Commonwealth of Virginia."

(e) "To examine into the business, books and accounts of any milk producer, association or producers, or *milk distributors,* their affiliates or subsidiaries * * *."

(g) "To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the *purposes* of this Act * * *."

(i) "The commission shall not exercise its powers in any market until a public hearing has been held for *such market,* and the commission determines that it will be to the public interest that it shall so exercise its powers in such market * * *."

It empowered the Commission to:

"* * * withdraw the exercise of its powers from any market after a public hearing has been held for such market, and the commission determines that it will be to the public interest to withdraw the exercise of its powers from such market * * *."

and further provided:

"The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk *produced* and a majority of the distributors (measured by volume) of milk distributed *in* said *market* acting jointly."

(j) "The commission, after public hearing and investigation, may fix the prices to be paid producers and/or associations of producers by distributors *in any market* or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any

> market, and may also fix different prices for different grades of milk."

It contained the further direction that in determining the reasonableness of prices to be charged in any market or markets the Commission

> "* * * shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Sub-section (k) provides:

> "The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing."

> "* * * may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular * * * market or markets within the Commonwealth."

Sub-section (m) vested the Commission with power to define

> "* * * what shall constitute a natural market area, and define and fix the limits of the milkshed or territorial area within which milk shall be produced to supply any such market area; * * *."

and further provided:

> "Any order of the Commission in refusing to issue a license, or suspending or revoking, a license, may be reviewed on appeal to the Supreme Court of Appeals." (Section 6.)

After public hearing, the Commission acting under this statute by order effective April 1, 1936, prescribed the boundaries of the Arlington-Alexandria Sales Area (see R. pp. 38, 39), fixed the minimum prices to be paid producers for milk (R. p. 39); and the minimum retail and wholesale selling prices for milk sold in that area (R. p. 42). The enforcement of these regulations in this area was enjoined by a State court at the instance of a distributor other than the plaintiffs here, pending an inquiry by that court into the alleged unconstitutionality of the law and the order in effect in this area under both the State and Federal Constitutions which injunction was dissolved on or about June 1, 1936 (R. p. 68).

On June 8, 1936, the appellants here filed their bill in the United States District Court for the Eastern District of Virginia at Richmond, to restrain the enforcement of the law alleging as the ground of the jurisdiction of that court that the suit was of a civil nature; that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs, and "arises under the Constitution of the United States."

It set out the nature of the business as above stated, and the order of March 27, 1936, that the plaintiff corporation sold milk to the individual plaintiff, High, in Washington at prices lower than the minimum established; which the plaintiff, High, had continuously sold

at retail to the general consuming public in the area and from stores therein maintained by him, at prices lower than the minimum established and that to require him to sell at the higher prices required by the order would injure the business of both; that under the rules and regulations of the Commission as construed and applied by the board, the board required a distributor to pay to the Milk Board all assessments levied on him by the Milk Board except on milk purchased from licensed distributors that the law regulation adopted as interpreted in their administration by the defendant board operated (1st) as a burden on interstate commerce, it required the plaintiff High to pay a duty on milk purchased from the plaintiff corporation in the District of Columbia and brought into Virginia, a charge he would not have to pay on purchases made from distributors within the Commonwealth; deterred the plaintiff corporation from shipping milk into the Commonwealth of Virginia, and constituted an attempt to regulate commerce among the States in violation of article 1, section 8 of the Constitution (see Bill, par. 26 sub-section A-e, Inc., R. pp. 10-11). (2nd) While the Act declares the existence of an emergency throughout the State the determination of its existence in any part, and, therefore, in all of the State, was in said act improperly delegated to the Milk Commission, for no provision required the Commission to establish milk area or prescribe prices, or rules and regulations except as may be determined by the Milk Commission (see R. p. 13), all in violation of the Fourteenth Amendment to the Constitution.

The bill also charged many other particulars in which their rights under the Federal Constitution, as well as under the State Constitution, were violated, but as none

of these are insisted on in the appellants' specifications of error, it will be unnecessary to enumerate them.

The appellees, The Milk Commission of Virginia, filed its answer to said bill (R. p. 70) and admitted as true many of the allegations of fact contained in the said bill; denied the allegations of paragraphs 3 and 4; denied knowledge as to the truth of the allegations contained in paragraphs 5 and 7 of said bill; denied that the Highland Farms Dairy was a distributor under the provisions of the Milk Act, and alleged that he was doing a retail milk business as "High's" in several establishments conducted by him under that title in the Arlington-Alexandria milk area. It admitted that a public hearing upon the establishment of a milk market for the Arlington-Alexandria area was called and held on February 20, 1936; and that Exhibit "C" filed with said bill was a copy of the rules and regulations fixed by the Commission for said market; but denied that said hearing was insufficiently and arbitrarily conducted; and denied that no investigation was made, and that they took no evidence or made no effort to investigate, or failed or omitted to inquire into the reasonableness of prices to be paid or charged, denied the allegation contained in paragraph 18 of said bill that they proceeded, without further investigation, to adopt and promulgate the said rules and regulations, covering the minimum prices to be paid by milk distributors to producers and the minimum wholesale and retail prices to be charged. The answer set out in detail the extent of the investigation conducted by them at these hearings and the scope of information gathered and considered; denied in detail the sub-paragraphs of paragraph 21 of the bill, and denied that either chapter 357 or the rules and regulations adopted pursuant thereto, as interpreted by defendants, either individually or as

Commission, attempts to interfere with and prohibit either of the said plaintiffs from importing into the Commonwealth of Virginia, from the District of Columbia, and expressly disclaimed any such intention or a purpose to require the plaintiff, Highland Farms Dairy, Inc., to purchase milk at the price fixed by the rules and regulations of the Commission, when, as a part of such purchases, the seller ships and exports said milk outside of the Commonwealth of Virginia, that the rules and regulations adopted pursuant thereto, as interpreted by defendants, either individually or as a Commission, requires the plaintiff, Luther W. High, to purchase milk at the price fixed by the rules and regulations of the Commission (or at any other fixed price) when such purchases were made outside of the Commonwealth of Virginia, and expressly disclaim any such intention, but admitted their intention of applying the Milk Act, and the rules and regulations adopted pursuant thereto for the Arlington-Alexandria milk market area, to all sale of milk in intrastate commerce for local consumption and deny that the application of the law and the rules and regulations contravene the provisions of the Fourteenth Amendment to the Constitution of the United States. It further admitted that the purchase of milk and cream by the plaintiff, Luther W. High, from the plaintiff, Highland Farms Dairy, Inc., as alleged by them were transactions in interstate commerce and not subject to the provisions of the Milk Act, or the rules and regulations of the Commission, and the defendants expressly disclaimed any intention of attempting to apply the Milk Act or regulations thereunder to such interstate transactions, and referring to the allegations of subparagraph H of paragraph 21 of the bill said:

> "If it is meant by sub-paragraph H that the plaintiff, Luther W. High, purchases milk and cream from the plaintiff, Highland Farms Dairy, Inc., in the City of Washington, District of Columbia, and imports it into the Commonwealth of Virginia, defendants admit that such traffic is interstate commerce; but, if it is intended to allege that, *because* milk and cream are bought in the City of Washington, District of Columbia, and imported into the Commonwealth of Virginia, and sold by the importer at retail in established places of business in Virginia, defendants deny that such transactions constitute interstate commerce."

There was a stipulation of the facts bearing on these charges and denials, and it is found in the record at pages 49 to 70, inclusive.

It is stipulated (R. p. 51) that the plaintiff, Luther W. High, is engaged in the business of operating retail stores for the sale of ice cream, milk and certain other dairy products in the Commonwealth of Virginia; and in the course and conduct thereof engages in the business of handling and selling bottled milk in and about the Arlington-Alexandria sales area, and has invested in said business in Virginia a sum in excess of $30,000.00, of which sum an amount in excess of $4,800.00 is invested in the places of business operated by the plaintiff in said Arlington-Alexandria sales area; that he purchases in the District of Columbia, under contracts, all of the output of bottled milk of the said plaintiff, Highland Farms Dairy, Inc., and does not purchase from producers or distributors within the Commonwealth of Virginia any milk for resale, but purchases solely and entirely from the plaintiff corporation all of the bottled milk which is sold in his stores. The orders for said bottled milk are telephoned daily and di-

rectly from the several stores operated in the said Arlington-Alexandria sales area to the dairy of Highland Farms Dairy in the City of Washington; and such sales are made to the plaintiff, Luther W. High, in the City of Washington and the delivery of said bottled milk to the said stores is made directly and in the trucks of Highland Farms Dairy, Inc.; that the plaintiff, Luther W. High, sells approximately 3,460 gallons of milk monthly in the Arlington-Alexandria area in the Commonwealth of Virginia to the general public at retail in units and at prices under the minimum prices prescribed.

It further stipulates that no deliveries are made by High to purchasers outside of or away from his several stores; immediate payment is required from purchasers; a deposit is required for the return of the bottle in which the purchased milk is contained; a differential in the prices of the commodities and units sold by the plaintiff at retail and the prices of similar grade commodities and units sold by other distributors in said area who permit charge accounts and furnish delivery service is an essential factor in the plaintiffs' method of competition; "that no legislative investigation into the conditions of the Milk Industry of Virginia was made or conducted by or at the instance of the General Assembly of Virginia as the basis for the enactment of the said chapter."

Upon the hearing of this bill and stipulation, the plaintiffs' bill was dismissed.

III

SUMMARY OF ARGUMENT

It will be seen by reference to the appellants' brief that many of these questions of unconstitutionality charged

in the bill have been abandoned, and that this decree of the District Court is now asked to be reversed under six specifications of error:

A. "No facts existed or exist justifying the enactment of Chapter 357 of the Acts of Assembly, Commonwealth of Virginia, Session 1934, and the Legislature has not found the existence of such facts, but, on the contrary, has undertaken to delegate to the Milk Commission the power of determining the existence vel non of such facts as to particular areas within the State."

B. "The Virginia statute is unconstitutional as constituting an improper delegation of legislative power to an administrative body."

C. "There has not been a suitable legislative investigation or determination of the facts the existence whereof is necessary to sustain the validity of the statute."

D. "The licensing provisions are invalid, as prescribing no standard for the grant, refusal or revocation of licenses."

E. "The enforcement of the statute will be an interference with interstate commerce."

F. "If the statute is void by reason of all or any of the defects herein complained of, it is void in its entirety, notwithstanding the saving clause contained in Section 16."

Each of these specifications is denied. They will be discussed under the following headings:

Point 1. The Virginia Legislature has found and declared the existence of facts justifying the enactment of the law and the delegation of the powers thereby made to administrative boards. Under this heading we will discuss points A and C, above mentioned.

Point 2. The Virginia statute does not unconstitutionally delegate improper power to an administrative body.

Point 3. The licensing provisions are valid.

Point 4. The enforcement of the statute will not constitute a burden upon or unlawful interference with interstate commerce.

Point 5. Sections 14 and 16 of the act in question negative any construction of the act which would render it unconstitutional, in whole or in part.

IV

ARGUMENT

Point 1. The Virginia Legislature has Found and Declared the Existence of Facts Justifying the Enactment of the Law and the Delegation of the Powers Thereby Made to Administrative Boards. Under this Heading We Will Discuss Points A and C Above Mentioned.

We have no quarrel with the appellants' contention that emergency does not create legislative power, as laid down in *Wilson* v. *New,* cited by appellants, 243 U. S. 332, 348, where Mr. Chief Justice White, speaking of the bill there in question, *an act of Congress,* delegating discretionary power to the President, and negativing the thought that the existence of a public right and the public power to preserve it was wholly subject to the preservation of a real or supposed private right, said:

> "Nor is it an answer to this view to suggest that the situation was one of emergency, and that the emergency cannot be made the source of power. Ex Parte Milligan, 4 Wall. 2. 18 L. Ed. 281. The

proposition begs the question, since, although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy interstate commerce, may be by *anticipation legislatively prevented,* by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."

The court was there speaking of interstate commerce purely within the control of Federal legislation. We are here dealing with *intrastate* commerce and legislation by a sovereign power, which declares:

"The production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is *in part* the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and *local political subdivisions thereof.*

And further:

"that unhealthful, unfair, unjust, destructive, and demoralizing economic trade practices have grown up and are now carried on in the productions, sale

> and distribution of milk and milk and cream products in the Commonwealth; * * * which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk."

And that these conditions were such as should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided. It cannot be denied that the legislature has declared the power as well as the purpose as well as the necessity for all the delegations made.

In *Block* v. *Hirsch*, 256 U. S. 135, 154, also cited by appellants, Mr. Justice Holmes speaking in respect to the war time rent regulation in the District of Columbia, thus expressed and qualified the law in this respect, saying at page 154:

> "No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts. *Shoemaker* v. *United States, etc.* (citing cases). But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact.—That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world."

The conditions justifying the rent legislation in the District of Columbia were no more notorious than were those then and now existing respecting the production and marketing of milk. The declarations of the Virginia Legislature was "concerning public conditions that by

necessity and duty it must know and is therefore entitled at least to great respect," especially so in the absence of any semblance of evidence showing that the conditions solemnly recited by the Legislature did not and do not exist.

That the regulations controlling the production and marketing of milk is a matter of public interest and regulation is shown conclusively in *Nebbia* v. *New York*, 291 U. S. 502, where at page 535, Mr. Justice Roberts, speaking for the court said:

> "The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state. * * * Nor is it the enjoyment of a monopoly; for in *Brass* v. *North Dakota*, 153 U. S. 391, 38 L. Ed. 757, a similar control of prices of grain elevators was upheld in spite of overwhelming and uncontradicted proof that about six hundred grain elevators existed along the line of the Great Northern Railroad, in North Dakota; that at the very station where the defendant's elevator was located two others operated; and that the business was keenly competitive throughout the state.
>
> "In *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011, a statute fixing the amount of premiums for fire insurance was held not to deny due process. Though the business of the insurers depended on no franchise or grant from the state, and there was no threat of monopoly, two factors rendered the regulation reasonable. There were the almost universal need of insurance protection and the fact that while the insurers competed for the business, they all fixed their premiums for similar risks according to an agreed schedule of rates."

And again:

> "Statutes prescribing in the public interest the amounts to be charged by attorneys for prosecuting certain claims, a matter ordinarily one of personal and private nature, are not a deprivation of due process."

And again:

> "It is clear that there is no closed class or category of business affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory."

* * * * *

> "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry for adequate reasons, is subject to control for the public good."

So it thus appears that the control of the price of milk being a matter affected with a public interest is within the police power of the State, and subject to its control.

As stated by Mr. Justice Brandeis in *Pacific States Box and Basket Company* v. *White*, 296 U. S. 176, 80 L. Ed. 138, at page 185:

> "The order here in question deals with a subject *clearly within the scope* of the police power. *Turner* v. *Maryland*, 107 U. S. 38; 27 L. Ed. 370; When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence

> of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Bordens Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 79 L. Ed. 281. The burden is not sustained by making allegations which are merely the general conclusions of law or fact."

It was suggested in that case that though presumptions of fact sufficient to justify the exertion of the police power attaches strongly to acts of the Legislature, as it is here, that no such presumption attaches to the action of an administrative body.

Mr. Justice Brandeis in the same case says on this point:

> "Sixth. It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. (Citing cases.) But where the regula-

> tion is within the scope of authority legally delegated the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 72 L. Ed. 357, 364."

This we think sufficiently disposes of the question as to the power of the Legislature to declare the existence of facts which must be taken as true in the absence of conclusive evidence to the contrary.

We submit further that the question as to whether the Virginia Legislature had the power to delegate any of its functions to an administrative board is a question of local or State law and not of Federal law, and that the Supreme Court of Appeals of Virginia has passed directly on the constitutionality of this statute and upheld it. (See *Reynolds* v. *The Milk Commission*, 163 Va. 957.)

This point was passed on directly in the case of *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176, 70 L. Ed. 138, where on page 187, Mr. Justice Brandeis speaking for the court, said:

> "It is argued that under the constitution of Oregon, its legislature was without power to delegate the authority to prescribe standard containers, citing *Van Winkle* v. *Fred Meyer*. This objection (which involves solely question of state law) was not made below, and was not discussed by the lower court, and is not included in the assignment of errors filed in this Court. We have no occasion to consider it."

As stated above this question has been conclusively passed on by the Supreme Court of Appeals of Virginia in the *Reynolds Case, supra*, which held that this dele-

gation was within the power of the Legislature, neither was this question within the competency of the trial court because the only ground of jurisdiction was a violation of a Federal right, and does not present a case arising between citizens of different states. The defendant is a citizen of Virginia, and both plaintiffs claim to be residents of the District of Columbia, and therefore though the corporate plaintiff is a Virginia Corporation not residents of different states.

In this connection, however, counsel for the appellants, seek to escape this result and say: "But whatever *prima facie* validity the Act might have is negatived by the terms of the Act itself. The Act, although purporting to find the existence of the facts thought to be sufficient to sustain its validity, is not in fact an exercise of such power as the Legislature might have if the existence of these facts were granted, but on the contrary, provides in section 3 (1), (*infra*, p. 38) that the Milk Commission shall not exercise its powers in any market until it determines after a hearing, that it will be to the public interest that it so exercise its powers in such market."

We submit that there is no substance in this argument. The purport of the legislation is entirely misconceived by counsel for the appellants.

The Act in question must be construed in a commonsense way. The declaration is not that these conditions exist in every nook and corner of the Commonwealth. It would be unreasonable to place such a construction upon this Act in view of all of its provisions, and the well known diversity of the interests of the State.

The Act does declare that the "production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; that the pres-

ent economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and *local political subdivisions thereof.*"

In a state which has such diversified industrial and agricultural life as Virginia has, it would be unfair and unreasonable to suppose that the Legislature desired to establish marketing areas for milk in an area which was not engaged in the production of milk and not substantially dependent upon such production. It would also be unfair to say that conditions enumerated in the Act prevailed in every square mile of the State. The declaration is that they are sufficiently extensive to materially affect the welfare of the State as a whole. The Act also by its recital sufficiently sets out the conditions at which the Legislature is aimed, to-wit:

> "An existing disparity between the prices of milk and cream and other commodities" the "Diminished power of milk producers to purchase industrial products" which has "broken down the orderly production and marketing of milk and cream" to an extent which "has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political subdivisions thereof" and "that the unhealthful, unfair, unjust, destructive, demoralizing economic trade practices have grown up and are now carried on in the productions, sale and distribution of milk, and milk and cream products in the Commonwealth"; to an extent "which impair the dairy industry in the Commonwealth and the constant supply of pure wholesome milk to the inhabitants thereof," and "menace

to the health and welfare of the inhabitants of the Commonwealth," and not necessary for all areas in the State without regard to conditions found to exist therein but "in the manner hereinafter provided for."

If it is claimed that the Legislature recognized the existence of these conditions to an appreciable extent in various sections of the State, and the possibility that they did not exist in other sections of the State, what more reasonable and proper provision could have been made to deal with the situation as it was believed to have existed than to appoint a Commission to deal with such situations existing in the local political subdivisions thereof, with a view to accomplishing the purposes of this Act, and clothe it with adequate power

"To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia;

"To supervise, regulate and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

"To examine into the business, books and accounts of any milk producer, association of producers, or milk distributors their affiliates or subsidiaries; to issue subpoenas to milk producers, associations of producers, and milk distributors, and to require them to produce their records, books and accounts; to subpoena any other person from whom information is desired;

"To take depositions of witnesses, within, or without the Commonwealth of Virginia.

"To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the purposes of this act."

That is all that this law has done. While its inquisitory powers are State-wide, the Legislature has put the further limitation upon them that the Commission

> "* * *shall not exercise its powers in any market until a public hearing has been held for such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market."

There is certainly no unreasonable regulation or discrimination in this legislation as to make it counter to any inhibition of the Federal Constitution. This is shown by the fact that the Commission is authorized on its own motion, or upon the written application of a producers association supplying a substantial proportion of the milk consumed in any market, or in the absence of such an association upon the written application of producers supplying a substantial proportion of the milk consumed in such market to make the necessary investigation. It will be observed that none of these provisions are dependent upon the action, either of the producers or the distributors, and that even when called at their instance the discretion of the Commission is not controlled by any but the public interest as declared in the policy declaring provision of the resolution coupled with the further provision that in determining the reasonableness of prices to be charged in any market or markets the Commission

> "* * * shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Surely there is nothing in any of these provisions which are in any way violative of any of the prohibitions of the Federal Constitution or of the Fourteenth Amendment, which so far as applicable to this case merely provides that

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

An attempt is made to distinguish this law from the principles laid down and accepted by this court in the *Nebia Case*, 291 U. S. 502, where this court said:

> "That statute created a milk control board with power 'to supervise and regulate the entire milk industry of New York State and a direction to ascertain by investigation and proofs what prices for milk in the several localities and markets of the State will best protect the milk industry in the State, and to fix by official order the maximum and minimum wholesale and retail prices to be charged for milk within the State, wheresoever produced."

In other words it is contended that the Virginia Act gives *discretionary* power to the Commission to regulate and control milk while the New York Act is mandatory, and that therefore the law is unconstitutional. A comparison of the provisions of these two laws in parallel columns follows, and shows that with the exception of sub-section (i) of section 3, the provisions of the two statutes although not identical in terms are in substantial accord with each other:

THE NEW YORK LAW

Chapter 158, Article 25, Acts of 1933:

Section 300. Legislative finding; statement of policy. This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale, and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper stand-

THE VIRGINIA LAW

Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political sub-divisions thereof; and

Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth; and

Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; now, therefore,

ards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination.

Section 301. Definitions. * * *

* * * * *

"Market" means any city, town or village of the state, or two or more cities and/or towns and/or villages and surrounding territory designated by the board as a natural marketing area.

Section 303. General powers. The board is hereby declared to be the instrumentality of the state for the purpose of attaining the ends recited in the legislative finding, statement of policy and application of article, and is hereby vested with power:

(a) To supervise and regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York * * *.

(b) To investigate as the emergency permits and regulate as the emergency requires all matters pertaining to the production, manufacture, storage,

The Virginia Law—Continued

1. Be it enacted by the General Assembly of Virginia, as follows:

"Market" means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area.

Section 3. Powers.—The commission is hereby declared to be an instrumentality of the Commonwealth, vested with power:

(a) To confer and co-operate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, with respect to milk coming into the Commonwealth and going out of the Commonwealth in interstate commerce, with a view of accomplishing the purposes of this act, and to enter into a compact or compacts for such uniform system of milk control.

(b) To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia.

transportation, disposal, distribution and sale of milk and milk products in the state of New York. * * *

The Virginia Law—Continued

(c) To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

(i) The commission shall not exercise its powers in any market until a public hearing has been held for such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market. The commission may, on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of the Commonwealth of Virginia, supplying in the judgment of the commission a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors, distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

There is nowhere in the New York law any provision that the Commission shall extend its regulations to *all* sections of the State whether there is any public necessity therefor or not. Neither does the Virginia Act in any way restrict its application to the entire State. The fact that it requires a public hearing before a mar-

ket is established while the New York Act contains no such requirement cannot be construed as making a difference in the State-wide application of each of the Acts. Should it be contended that there is no presumption of the existence of the necessary facts, so far as the Commission is concerned, and that there are no specific findings on these particular points upon which the declared policy is based, the answer is found in the opinion of this court in *Pacific States Box and Basket Company* v. *White,* 296 U. S. 176; 80 L. Ed. 138, where at page 186, Mr. Justice Brandeis says:

> "Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required. It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern."

Point 2. The Virginia Statute Does Not Unconstitutionally Delegate Improper Power to An Administrative Body.

The second point relied on by appellants is:

> "THE VIRGINIA STATUTE IS UNCONSTITUTIONAL AS CONSTITUTING AN IMPROPER DELEGATION OF LEGISLATIVE POWER TO AN ADMINISTRATIVE BODY."

What has already been said in discussing the first and third points, (a) and (c), in the appellants' brief, is a

complete answer to this proposition, especially the extract from *Pacific States Box and Basket Company* v. *White,* 296 U. S. 176, because it involves solely a question of State law, which has been passed on by the Supreme Court of Appeals of Virginia in *Reynolds* v. *The Milk Commission of Virginia, supra.*

The cases cited by the appellants to support this contention in this respect are: *Field* v. *Clark,* 143 U. S. 649; *Hampton* v. *United States,* 276 U. S. 394, and *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, and *Wichita R. R. & Light Company* v. *Public Utilities Commission of the State of Kansas,* 260 U. S. 48, 59.

It is sufficient to say that each of these cases, except the last, involved Federal statutes undertaking to delegate legislative authority to the President of the United States or other executive officers. In the first named case, *Field* v. *Clark,* the President was authorized to suspend certain tariffs when he should be satisfied that the discriminating duties of certain "foreign nations," so far as they operate to the disadvantage of the United States, have been abolished, while recognizing Congress can not delegate legislative power to the President; the court said at page 670:

> "The words 'he may deem,' in the third section, of course implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing

> and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress."

This is equally true here.

In *Wichita R. R. & Light Company* v. *Public Utilities Commission of the State of Kansas,* 260 U. S. 48, 59, while it involved the construction of a state statute in a suit between the Public Utilities Commission of Kansas and a West Virginia Corporation, and therefore residents of different states, which statute had never been construed by the Kansas court, even in that opinion the court recognized the principles here involved in the following language:

> "That maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation *of administrative boards to apply to* the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be *effectively exercised.* In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action."

So outside of the question of this being purely a question of State law, as stated in the case of *Pacific States Box and Basket Company* v. *White, supra,* the Virginia statute in creating this administrative agency did enjoin upon it a certain course of procedure and rules of decision, but did not enjoin as a condition precedent to an order the making of findings of fact. It only required a public hearing after notice that the Commission in fixing prices should take into consideration certain enumerated elements, all of which have been complied with, and there is not a particle of evidence to show there was any departure or violation of these principles.

Counsel for the appellants contend that even though there is no unlawful delegation of legislative power to the board, that that paragraph of sub-section (i) of section 2, directing the Commission to withdraw the exercise of its power "from any market upon written application of a majority of the producers measured by volume of milk produced and a majority of the distributors measured by volume of milk distributed in said market, acting jointly," is unconstitutional, and cite in support thereof *Eubank* v. *Richmond,* 226 U. S. 137, 143. This provision is not subject to the criticism to which the city ordinance was subjected by the court, which said:

> "It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. * * * One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power?"

The declaration of the purposes of this act show that one of its primary purposes is to protect producers and distributors of milk from the evils prevalent in some sections of the State and enumerated in the Act, and to restore the disparity between the prices of milk and cream which has diminished the powers of milk producers to purchase industrial products, has broken down the orderly production of marketing milk and seriously impaired agricultural assets and also to protect them against "unhealthful, unfair, unjust, destruction and demoralizing economic trade practices," which have grown up "and are now carried on in the production, selling and distribution of milk and cream products in the Commonwealth which impair the dairy industry in the Commonwealth," and that the Legislature also thought that if it was the combined wish of the producers and distributors of milk in any given market area, that these results no longer existed; and should request that the Commission withdraw its activities from their market; that the Commission must withdraw.

But granting this provision does delegate unauthorized legislative power to producers and distributors for whose protection the law was primarily intended and is therefore unconstitutional, still it is separable and under the language of the Act itself:

> "Section 16. Constitutionality. 'If any section, clause, or sentence, or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby' "

it leaves the residue of the Act unimpaired.

Point 3. The Licensing Provisions Are Valid

The appellants controvert this in their Point "D".

This contention deals with section 3 (k) of the Act, and is dealt with very conclusively in the opinion of Circuit Judge Soper (R. p. 87), where at page 99, he says:

> "The plaintiffs emphasize the license provisions of the act, contending that here, in any event, are provisions so devoid of legislative standard as to leave to the Commission the unrestricted power to grant or refuse a license to a dealer in milk in its arbitrary discretion; and it is contended that these provisions not only involve an unlawful delegation of power, but in their effect amount to a denial of due process of law guaranteed by the Fourteenth Amendment."

After quoting at length the provisions of section 3 (k), sections 5, 6, 8, and sections 12 and 13 of the Act, he says at page 101:

> "The stipulation shows that the Milk Commission has threatened to invoke against High the remedy by injunction provided in Section 12 of the act, so as to restrain him from continuing his business as a milk dealer without first having obtained the required license, and also from violating the regulations of the commission as to retail sale prices. It does not appear that High has ever made application for a license or intends so to do; and the only reasonable inference to be drawn from the institution and prosecution of this case is that the plaintiffs, regarding the act as unconstitutional, propose to continue their trade practices irrespective of its provisions.
>
> "On the other hand, no conditions or restrictions upon the grant of licenses have been imposed in the

regulations of the Board, and there is no indication that a license would be withheld from any one willing to abide by the terms of the statute. In *Reynolds* v. *Milk Commission,* 179 S. E. 507, 514, it was said that the license provision was not challenged. It might be proper also in the pending case to disregard it in the absence of arbitrary and unreasonable conduct on the part of the commission, and of any evidence that such conduct is contemplated.

"Nevertheless, it is not inappropriate to point out that the license provisions of the act should not be interpreted to vest the Board with the absolute power to grant or refuse licenses, if any other reasonable construction can be adopted. Such a grant of power would be invalid and the attempt to exercise it arbitrarily would be restrained by a court of equity as a violation of the due process clause of the Fourteenth Amendment. *Yick* v. *Hopkins,* 118 U. S. 356; *Lieberman* v. *Van DeCarr,* 199 U. S. 552; *Douglas* v. *Noble,* 261 U. S. 165; *Lehmann* v. *State Board of Public Accountancy,* 263 U. S. 394."

We might here add that in addition to what is said Judge Soper said: "The record shows conclusively that not only has no license been denied High, but licenses have been tendered him and he has refused to make application for a license." See affidavit of Philip Rosenfeld, in Stipulation of Facts (R. p. 75, par. 2).

Judge Soper's opinion continues (R. p. 102):

"In our opinion, the act is susceptible of a more reasonable interpretation. It was not the intent of the legislature to confer upon the administrative board the extraordinary power to determine at will who should and who should not engage in the distribution of milk, but rather to render available to

the Milk Commission and the local boards a list of authorized distributors of milk and to enable the authorities more readily to supervise the business of distribution and to enforce the rules, regulations and orders promulgated by the Board.

"In the absence of provision to the contrary, it would appear to be the duty of the Board to issue a license to any distributor complying with the statute and to preserve his license until some violation of the act, or of a regulation or order had taken place. Such a standard would be sufficient to sustain the act although less specific in detail than other similar statutes. In *Lieberman* v. *Van De Carr*, 199 U. S. 552, the Supreme Court considered a section of the Sanitary Code of New York City, which provided that no milk should be received for sale and delivered in the City of New York without a permit in writing from the Board of Health. It was objected that the statute devolved upon the Board of Health absolute and despotic power to grant or withhold permits to milk dealers and was therefore not due process of law. The Supreme Court, commenting on the decisions of the New York courts which indicated the power to issue or withhold permits must be used in the exercise of a reasonable discretion and that arbitrary action and unjust discrimination would not be tolerated said:

> " 'That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people there can be no doubt.'

"After citing certain cases, the court continued:

> " 'These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a federal court.'

"In *Smith* v. *Cahoon,* 283 U. S. 553, 562, it was said:

> " 'The principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration.'

"See also *Lehmann* v. *State Board of Public Accountancy,* 263 U. S. 394; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *The Problem of Apparently Unguided Administrative Discretion* by Lewis Allen Sigler, 19 St. Louis, L. R. 261, 291, *et seq.*"

In this same connection and speaking of this and other provisions of the Act the Supreme Court of Appeals of

Virginia, construing this very Act, in *Reynolds* v. *Milk Commission,* 163 Va. 957, speaking through Justice Gregory, said:

> "It should also be borne in mind that an act is not to be construed as meaning that regulations promulgated until it will at some future time be exercised capriciously, arbitrarily or inequitably. It will be time enough to complain when, if ever, the power shall be thus abused.
>
> "Then, too, another general principle applicable here is that a state legislature deals with situations from a practical standpoint. It is better qualified than the court to determine the necessity, character and degree of regulation of an industry, which new and perplexing conditions may require; and its conclusions should not be disturbed by the courts unless they are clearly arbitrary and unreasonable."

Point 4. The Enforcement of the Statute Will Not Constitute a Burden Upon or An Unlawful Interference With Interstate Commerce.

"THE ENFORCEMENT OF THE STATUTE WILL BE AN INTERFERENCE WITH INTERSTATE COMMERCE."

This contention of appellants to the contrary, their "Point E" is wholly without merit. The statute, section 14, expressly provides:

> "No provision of this act shall apply to or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

And section 16 provides:

> "If any section, clause, or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby."

In addition to this the defendant, Milk Board, in its answer reiterate time again their denial that chapter 357 of the Acts of 1934, or the rules and regulations adopted pursuant thereof, as interpreted by defendants, either individually or as a Commission, attempts to interfere with and prohibit either of the plaintiffs from importing milk into the Commonwealth of Virginia from the District of Columbia, and expressly disclaim any such administrative intention, and deny that the Act requires the Highland Farms Dairy to purchase milk at the price fixed by the rules and regulations of the Commission in Virginia for export, or requires the plaintiff, Luther W. High, to purchase milk at the price fixed by the rules and regulations of the Commission when such purchases are made by him outside of the Commonwealth of Virginia.

It is therefore clear that the only milk over which this Commission claims to possess or to exert jurisdiction is milk held in the State of Virginia for local sale by the defendant, Luther W. High. That milk so held in Virginia from whatever source it is bought is not in interstate commerce and the regulation of the sale thereof is not a regulation of interstate commerce is clearly shown by the great weight of authority. See *Sonneborn Brothers* v. *Keeling*, 262 U. S. 506, 67 L. Ed. 1095, which is directly in point:

Sonneborn Brothers were dealers in petroleum products, with its principal place of business in New York City. It opened an office in Dallas, Texas, and maintained it and connecting warerooms. The Texas law imposed a tax amounting to 2% of the gross sales arising from the sale of oil shipped into Texas and afterwards sold from the storerooms in *unbroken original packages.*

In discussing the question, whether or not the oils so imported were subject to this tax, the court said at page 506, L. Ed. 1097:

> "The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouse in Texas, there held for sale in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.
>
> "Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the State. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax upon the oil or all sales of it, without regard to origin, would be neither a regulation nor a burden on interstate commerce of which this oil had been the subject.
>
> "This has been established so far as property taxes on the merchandise are concerned by a formi-

dable line of authorities; (Citing many cases) * * *

"But the argument is that for articles in original packages, the sale is a final step in the interstate commerce, and that the owner may not be taxed upon such sale, because this is a direct burden on that step. The reasoning is based on the supposed analogy of the immunity from state taxation of imports from foreign countries, which lasts until the article imported has been sold, or has been taken from its original packages of importation and added to the mass of merchandise of the state. This immunity of imports was established by this Court in *Brown* v. *Maryland,* 12 Wheat, 419 6 L. Ed. 678; and was declared in obedience to the prohibition of the Constitution contained in Section 10, Article 1, paragraph 2, providing that

> " 'No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'

"The holding was that the sale was part of the importation. It is the article itself to which the immunity attaches, and whether it is in transit or is at rest, so long as it is in the form and package in which imported, and in the custody and ownership of the importer, and the state may not tax it. This immunity has been enforced as against a license or occupation tax on the importer in *Brown* v. *Maryland,* 12 Wheat 419; 6 L. Ed. 678 * * *.

"Cases subsequent to *Brown* v. *Maryland,* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation attaches to the import itself before sale, while the immunity in case of an article, because of its relation to the interstate commerce, depends on the question whether the tax

challenged regulates or burdens interstate commerce.

"The first of the cases making this distinction is *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382. In that case, Woodruff, an auctioneer in Mobile, received, in the course of his general business, for himself and as consignee and agent for others merchandise from Alabama and from other states, and sold it in unbroken packages. The City of Mobile under its charter, levied a uniform tax on real and personal property, on sales at auction, on sales of merchandise, and on capital employed in the business in the City. Woodruff objected to pay any tax on the auction sales of merchandise from other states in original packages. The question most considered by the Court was whether merchandise exported from one state to another was an export which a state was forbidden to tax by article 1, Section 10, par. 3, of the Federal Constitution, above quoted. It was held that it was not, and that the words 'imports and exports' as there used, referred to and included only merchandise brought in from, or transported to foreign countries. The Court further held that such a tax, which did not discriminate against the sale of goods from other states, but was imposed upon sales of all merchandise, whether its origin was in Alabama or in any other state, was not 'an attempt to fetter commerce among the states.' At the close of the opinion in *Brown* v. *Maryland*, Chief Justice Marshall, made the remark 'that we suppose the principles laid down in this case apply equally to importations from a sister state.' This was pronounced in *Woodruff* v. *Parham*, not to be a judicial decision of the question, but an obiter dictum.

"* * * Immediately following *Woodruff* v. *Parham* in *Hinson* v. *Lott*, 8 Wall. 148; 19 L. Ed. 387, in which was at issue the validity of a provision of the Alabama law, that, before it should be law-

ful for a dealer in introducing spirituous liquors into the state to offer the same for sale, he must pay 50c a gallon thereon. The provision was sustained as not being an attempt to burden interstate commerce, because, by another section of the same law, every distiller of the state was required to pay 50c a gallon on all liquor made by him, and the two sections were complementary, in order to 'make the tax equal on all liquors sold in the state.'

"*Woodruff* v. *Parham* was affirmed and applied in *Brown* v. *Houston,* 114 U. S. 622; 29 L. Ed. 257, where coal mined in Pennsylvania and sent in barges to New Orleans, to be sold after arrival from those barges, without being landed, to a vessel bound to a foreign port, was held, while awaiting sale, to be subject to taxation by the State as property in Louisiana.

"The case of *Woodruff* v. *Parham* has never been overruled but has often been approved and followed, as the cases above cited show. As an authority it controls the case before us, and shows conclusively that the tax in question is valid.

"The distinction between the immunity from state taxation of imports in original packages, and that of articles coming from interstate commerce in original packages, is again brought out with emphasis by Mr. Justice White, aforewards Chief Justice, in *American Steel and Wire Co.* v. *Speed,* 192 U. S. 522; 48 L. Ed. 547. In that case articles of hardware were shipped by the American Steel and Wire Company from their factories in the East to Memphis, Tenn., and there kept in storage in original packages, to be distributed to Arkansas and other states when sold, on orders to be subsequently secured. Memphis, under a general law, imposed a merchant's tax on the Wire Company, based on the average capital invested in the business, and included this stock of original packages in the average. The Court conceded:

> " 'That if these goods were "imports" that they could not be taxed under *Brown* v. *Maryland,* but said: "But the goods not having been brought from abroad, they were not imported in the legal sense, and were subject to state taxation after they had reached their destination and whil'st held in the state for sale" and cited the cases of *Woodruff* v. *Parham* and *Brown* v. *Houston.*'

"Speaking of these cases, the Justice said:

> " 'Those two cases, decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the states of the Union'."

Innumerable cases are cited in this opinion to the same conclusion.

It is claimed in appellants' brief that some of the provisions of this Act, taken literally in conjunction with certain definitions in the statute, but without regard to the limitation above quoted from chapter 357, section 14 of the Virginia Act are broad enough to include some persons engaged in interstate commerce, and this it is said invalidates the Act even though the Act itself declares that it does not apply to interstate commerce.

Section 16 further provides:

> "If any section, clause or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby."

This contention of appellants is wholly unwarranted, as shown by the opinion of this court in *Hendrick* v. *Maryland,* 235 U. S. 610; 621; 59 L. Ed. 385; 390; where it was held that there is no presumption that the administrative officers of the State are violating a right secured to a non-resident even though the statute may so declare in the absence of some "definite and authoritative ruling" by the courts of the State. In that case the Maryland statute required all the non-residents operating automobiles over the roads of the State to have a permit unless they had complied with the laws of the State of which they were citizens, but the District of Columbia was expressly exempted from this exception.

Mr. Justice McReynolds, delivering the opinion of the court, after referring to this discrimination, said, at page 621, L. Ed. 390:

> "If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling by the courts of the State we will not assume *that upon a proper showing this will be denied.*"

And proceeded:

> "The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia in respect to registering motor vehicles and licensing operators, or that he applied to the Maryland Commissioner for an identifying tag or marker—prerequisites to a limited use of the highways, without cost by residents of other states * * * Only those whose rights are directly affected can

properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto."

In *Smith* v. *Alabama,* 124 U. S. 465; 480; 35 L. Ed. 508, 513, where the validity of an Alabama statute forbidding any engineer to operate a locomotive without first undergoing an examination, was under attack, as being a burden on interstate commerce, the court said, speaking through Mr. Justice Matthews:

"But the provisions of the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves they are parts of that body of the local laws which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced, until they come in conflict with express enactments of Congress in the exercise of its powers over commerce, and which, until so displaced according to the evident intention of Congress remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in the commerce among the States."

INCIDENTAL INTERFERENCE WITH INTERSTATE COMMERCE WILL NOT INVALIDATE A STATUTE OTHERWISE WITHIN THE POLICE POWER OF A STATE.

In *Mintz* v. *Baldwin,* 269 U. S. 346; 77 L. Ed. 1245, the court there dealing with a New York statute, prohibiting the importation into its boundaries of cattle for

dairy or breeding purposes unless certified by the officers of the State of origin to be free from certain diseases, said:

> "Unless the Act itself operates to prevent the enforcement of the order the suit was rightly dismissed. The express exclusion of state inspection extends only to cases where federal inspection has been made and certificate issued. The clauses cannot be read to extend to other cases. The expression of purpose so to limit the exertion of state power strongly suggests that Congress intended not otherwise to trammel the enforcement of the state quarantine measures."

In some way under the provisions of sections 143 to 148, Title 21 U. S. C. the Federal Law prohibits the importation into the United States of any milk from herds not healthy and where a physical examination of such cows has not been made within one year preceding, or when such milk or cream if raw is not produced from cows which have passed the tubercular test within one year, or when the sanitary condition of the dairy farm or plant, in which such milk or cream is produced or handled, does not score certain points. But section 148 provides that nothing in sections 141 to 149 is *"intended nor shall be construed to effect the powers of any state, or any political subdivision to regulate the shipment of milk or cream into, or the handling, sale or other distribution of milk or cream in such state or political subdivision after the milk and/or cream shall have been lawfully imported under the provisions of said section."*

Thus it shows that though the Federal Government permitted the importation of milk and cream from foreign countries under this Act it expressly recognized the reserved power of states to still further regulate the ship-

ment of milk or cream, or the other distribution of such milk or cream, within its own borders.

In *Hygrade Provision Company* v. *Sherman*, 266, U. S. 497; 69 L. Ed. 402, which involved the validity of a New York State Act prohibiting dealers in Kosher meat from falsely representing its character or from selling Kosher meat and non-Kosher meat from the same place without advertising that fact. Mr. Justice Sutherland, delivering the opinion of the court, said:

> "It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination against it, are fairly within the range of the police power of the state, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any congressional legislation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce."

See also *Bayside Fish Flour Company* v. *Gentry*, decided March 2, 1936, 297 U. S. 422, 80 L. Ed. 772. The case of *Baldwin* v. *Seelig*, 294 U. S. 511; 79 L. Ed. 1032, is not in conflict with the principles here asserted. That case dealt with a provision of the New York statute construed in the *Nebbia Case*. There is no corresponding provision in the Virginia Statute, to-wit:

> "A provision whereby the protective prices are extended to that part of the supply (about 30%) which comes from other states. The substance of the provision is that, so far as such a prohibition is permitted by the Constitution, there shall be no sale, within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the State."

This court held this clause unconstitutional, yet in no way intimated such holding would invalidate the balance of the statute, but said on page 519:

> "The validity of that system in its application to producers doing business in New York State has support in our decisions. Citing *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940; *Haggeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 77 L. Ed. 259; *Bordens Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 79 L. Ed. 281."

And on page 526 the court said (in language peculiarly applicable to this case):

> "There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state."

The appellants cite the *Schechter Case—Schechter* v. *United States*, 295 U. S. 495; 79 L. Ed. 1570.

This court invalidated the Act of Congress there involved partly because the transaction sought to be dealt with under the Federal Act was an *intrastate* transaction, although the conditions surrounding it had their origin in interstate commerce. Mr. Chief Justice Hughes, delivering the opinion of the court, said:

> "But the Code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of

the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held that poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. *Brown* v. *Houston,* 114 U. S. 622, 632, (Citing cases)."

Public Utilities Commission v. *Landon,* 249 U. S. 329; 63 L. Ed. 577, is peculiarly applicable to this case.

The Kansas Natural Gas Company, a Delaware corporation, owned a system of pipe lines extending from Oklahoma and Kansas to various terminal towns and cities in Kansas and Missouri, and produced, purchased and transported, distributed and sold natural gas prior to October 9, 1912. During that period by separate agreements it undertook to supply many local companies with gas for ultimate sale to their customers, and to accept therefor a definite proportion—generally two-thirds—of the gross amounts paid by such customers. Permanent physical connections permitted gas to pass from the Gas Company's pipe lines into the several local companies' mains. In October, 1912, the United States District Court for Kansas appointed receivers for the Gas Company, and shortly thereafter extended the receivership to Missouri and Oklahoma. The receivers took over the company's property, affairs, and business, without specifically adopting or disavowing the supply contracts. Sub-

sequently available gas diminished; pipe lines to new wells became necessary; operating costs increased; and the sums received from local distributing companies were inadequate for the receiver's demands.

In 1915 the receivers petitioned the Kansas P. U. C. for higher rates. The Commission authorized what is known as the 28c schedule, much below the rates requested.

The receivers began proceedings against the Kansas and Missouri Commissions, 32 local distributing companies, and 47 cities and towns, alleging that the action by the State Commissions resulted in inadequate and confiscatory rates, and unduly burdened interstate commerce, and that the city ordinances fixing the prices were unreasonable, non-compensatory and confiscatory and prayed injunctions.

The court below held the business carried on by the receivers to be interstate commerce, that the Commission's actions interfered with and thereby burdened interstate commerce, took the receivers property without due process of law, and enjoined the Commission and the distributing companies from interfering with the establishment of such reasonable and compensatory rates as the court might approve.

Mr. Justice McReynolds delivering the opinion of the court said, page 244, L. Ed. 587:

> "We think the trial court properly overruled the objections offered to its jurisdiction, and nothing need be added to the reasons which it gave, P. U. R. 1917 A. 102, 234 Fed. 152, 155. But we can not agree with its conclusions that local companies, in distributing and selling gas to their customers, acted as mere agents, immediate representatives or instrumentalities of the receivers, and as such car-

ried on without interruption interstate commerce set in motion by them.

"That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that, as part of such commerce, the receivers might sell and deliver gas to be transported to local distributing companies free from unreasonable interference by the State. *American Exp. Co.* v. *Iowa,* 196 U. S. 133; 143, 40 L. Ed. 417; *West* v. *Kansas Natural Gas Co.,* 221, U. S. 229; 55 L. Ed. 716; *Haskell* v. *Kansas Natural Gas Co.,* 224 U. S. 217; 56 L. Ed. 738;

"But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which *had* moved in such commerce, and then disposed thereof at retail in due course of their own *local business.* Payment to the receivers of sums amounting to two thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent, or otherwise, in the retail transactions carried on by the local companies. Interstate commerce *is a practical conception* and what falls within it must be determined upon consideration and established facts and known commercial methods. *Rearick* v. *Penn.,* 203 U. S. 507; 51 L. Ed. 295; *Pipe Line Cases* (*United States*) v. *Ohio Oil Co.,* 234 U. S. 548; 58 L. Ed. 1459; The thing which the receivers actually did was to deliver supplies to local companies."

The contention of appellants that the provisions in section 14, shall not be construed as a regulation of interstate commerce, and that section 16 can not be construed

as showing the intent of the Legislature that any constitutional provision should be separable is without merit.

This question was discussed in *Packer Corporation* v. *State of Utah*, 285 U. S. 105, 76 L. Ed. 643, which involved a statute prohibiting tobacco advertising on billboards, street car signs and placards, while permitting it in newspapers and magazines. The court held that where a classification adopted in a state statute with a view to avoiding conflict with the commerce clause of the Federal Constitution can not be deemed arbitrary, and said:

> "The Packer Corporation, a Delaware corporation, engaged in billboard advertising and authorized to do business in Utah, was prosecuted under this statute for displaying a large poster advertising Chesterfield cigarettes on a billboard owned by it and located in Salt Lake City. The poster was displayed pursuant to a general contract for advertising Chesterfield cigarettes, made by the defendant with an advertising agency in the State of Ohio. Both the poster and the cigarettes advertised were manufactured without the State of Utah and were shipped into it by a foreign corporation. The defense was that the state statute violated several provisions of the Federal Constitution."

The court upheld this legislation, and said:

> "It is denied that the State may, under the police power, regulate the business of selling tobacco products."

and added:

> "Action by a state taken to observe one prohibition of the Constitution does not entail the violation of another, *Raley & Bros.* v. *Richardson,* 264 U. S. 157, 160 * * *.
>
> "It is reasonable ground of classification that the state has power to legislate with respect to persons in certain situations, and not with respect to those in a different one."

The same point was determined in *Matson Navigation Company* v. *State Board of Equalization,* decided March 2, 1936, 297 U. S. 441, 80 L. Ed. 791, where Mr. Justice Butler, delivering the opinion of the court, said, page 446, L. Ed. 796:

> "There is no merit in the suggestion that failure of the act to extend to foreign corporations exclusively engaged in interstate or foreign commerce in California constitutes an unconstitutional discrimination against appellants.
>
> "A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question."

Surely, if this is true, there is nothing unconstitutional in the state so guarding its legislation that it is incapable of being construed as violative of any Federal inhibition.

Appellants at page 27 of their brief, insist that the tax authorized by section 9 of the Act is a burden upon interstate commerce because milk purchased outside of the state by the distributor is taxed on the same basis that milk purchased inside of the state by the same dealer is taxed.

Section 9 of the Virginia Act reads:

> "The Milk Commission shall prepare an annual budget and shall collect the sums of money required

for this budget from the local milk boards in the form of monthly assessments and the local milk boards shall pay the assessment so levied. The assessment so levied shall not exceed 2c per 100 pounds of milk handled in each market in which the provisions of this Act are in operation."

It is apparent that this tax is not a discrimination against imported milk. Section 11 (b) which is *in pari materia* with section 9, reads:

"The expenses of the milk board, including salaries and/or the per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this Act, and including the assessment levied by the State Milk Market Commission, shall be met by an assessment of not over 2c per 100 lbs. of milk and/or cream (converted to terms of milk, of 4% butterfat) delivered by distributors and not over 2c per 100 lbs. of milk and/or cream (converted to terms of milk of 4% butterfat) sold by producers."

And Regulation No. 6 (R. p. 44) provides

"Each distributor shall pay to the milk board all assessments levied on him by the milk board except on that milk which has been purchased from *licensed distributors* and shall deduct and pay to the milk board all assessments levied by the board on each producer delivering milk to him. No assessment on producers shall exceed 2c per 100 lbs. of milk and no assessment on distributors shall exceed 2c per 100 lbs. of milk. 1c per 100 lbs. of milk and/or cream shall be levied and collected by the milk board *on all milk* received by a distributor and 1c per 100 lbs. on all milk sold or used by a distributor. Such assessment shall be collected

by the 15th day of each month following the previous delivery period, and delivered to the secretary of the State Milk Commission for deposit to the account of the State of Virginia."

Judge Soper, in dealing with this contention and construing these sections, replies to it unanswerably (R. p. 110, *et seq.*), as follows:

"It thus appears that the milk commission, in order to cover its own expenses, has directed the levy of an assessment of 1c per 100 lbs. on milk received by a distributor and 1c per 100 lbs. on milk sold by a distributor. The local milk board, when set up, would be empowered to levy an additional sum not exceeding the maximum provided in the act to cover its own expenses. The terms of these sections of the act and of Regulation 6 it is urged would require the dairy in Washington, if licensed as a distributor, to handle milk for sale in Virginia, to pay an assessment not exceeding 2c per 100 lbs. on all milk sold by it to High in Washington and shipped by it in interstate commerce, to its stores in Virginia. We need not stop to consider this point for as we have seen, *the dairy is not required by the act to take a license.* (Italics supplied.)

"However, it is also said that even if the dairy be not licensed as a distributor, nevertheless, the assessment would bear upon interstate commerce, because High, purchasing all of the milk sold by him in Virginia from the dairy would be required to pay an assessment thereon of not more than 2c per 100 lbs., and an assessment he would not have to pay under Regulation 6 if he purchased his milk from a Virginia distributor. Under the law, High would not pay an assessment on milk purchased by him from a licensed distributor in Virginia, because the assessment would have already been paid

by the latter. But if High should buy from a producer in Virginia, he would pay for the use of the milk commission 1c per 100 lbs. and the remainder of the assessment would be deducted from the price paid to the producer. Even so, it is difficult to understand how interstate commerce would be burdened or interfered with as a practical matter. Obviously, the sales by the dairy to High in Washington, and the subsequent interstate shipment of the goods would not be curtailed if the dairy, not being subject to Virginia price regulation, could continue to sell cultured whole milk at its wholesale price of 6c per quart as against 11c which a Virginia distributor would be required to charge. The assessment of 2c per hundred pounds paid by High in Virginia would be exactly the same as that borne by milk produced and distributed in Virginia; and the imposition of the assessment puts the merchandise shipped from Washington on equality with all other merchandise in the state, and constitutes no hindrance to the introduction of the goods from Washington into the state for sale upon the basis of equal competition with the local product.

"Furthermore, the assessment is levied upon the goods after they have reached their destination in Virginia and the state has acquired the power to impose a tax or assessment upon them to defray the expenses of the administration of the law. It is well established that there is no burden upon interstate commerce from the imposition of a state tax upon goods which have come to rest in the state at the end of interstate transportation, provided that the state law levies the same tax on all goods of the same sort without regard to their origin. The prohibition contained in Article I, Section 10, Paragraph 2 of the Constitution forbidding a state to lay imposts or duties on imports or exports is not applicable to such a statute and the validity thereof must be determined by deciding whether it

amounts to a regulation of interstate commerce in violation of Article I, Section 8, Paragraph 3 of the Constitution."

After quoting from *Sonneborn Bros.* v. *Cureton*, 262 U. S., 506, Judge Soper continues:

"The same doctrine was applied in *Willoil Corp.* v. *Pennsylvania*, 294 U. S. 169, 175, where it was said: " 'Our decisions show that, if goods carried from one state have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction.' *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622, 632; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519-522; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506. 'And as that rule applies whether the burden falls directly or indirectly (*Banker Bros. Co.* v. *Pennsylvania*, 222 U. S. 210) it is not material whether the tax is upon the sale and delivery or upon the property.' "

Appellants, in support of their contention, cite *State Board of Equalization of California* v. *Young*, 81 Advance Opinions, 37, 57 S. C. R. 77; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; and *Bowman* v. *Continental Oil Co.*, 256 U. S. 642.

Neither of these cases have any controlling bearing on the point herein at issue.

Bowman v. *Continental Oil Co.*, 256 U. S. 642, 65, L. Ed. 1139, was decided in June, 1921. It involved a license tax imposed by the State of New Mexico upon distributors of gasoline. All of the gasoline handled by the Continental Oil Company was received in interstate commerce, of which part 94 5/10% was sold in

broken packages and about 5 5/10% was sold in original barrels, packages or tank cars, in addition to which the company consumed in the conduct of its own business about 8% of its total sales. The law imposed upon all dealers in gasoline in the state a license tax of $50.00 and in addition, thereto, an excise tax of 2c per gallon on all gasoline sold. The court, apparently holding at that time that sales in original packages was the *sole criteria* for ascertaining whether property continued in its character of interstate commerce, held that the license tax of $50.00 on a dealer whose business consisted in part of selling property received in interstate commerce in the original packages was invalid in its entirety because there was no provision in the law by which the tax could be apportioned, but in the same opinion held that the excise tax of 2c per gallon upon all gasoline sold in intrastate commerce, was valid, though purchased in interstate commerce.

It is clear here that so far as the individual, High, is concerned, all of his sales are intrastate and in quantities desired and no license tax is imposed on him in any way.

In the *Bowman Case, supra,* this court drew this distinction and applied it in the following terms, at page 646:

> "Assuming that, upon the question of construction, the district court was right, and that the act manifests an intent to tax interstate as well as domestic transactions in gasolene" (An assumption which cannot be sustained here in view of the express declaration of the Act itself in Section 14, that it shall not apply or be construed to apply in foreign or interstate commerce) "and is not in this respect capable of separation, still, so far as the

excise tax is concerned,—imposed, as it is, upon the *sale* and *use* of gasolene according to the number of gallons sold and used,—the divisible nature of the subject renders it feasible to control the operation and effect of the tax so as to prevent it from being imposed upon sales in interstate commerce, while allowing the state to enforce it with respect to domestic transactions; and with the allowance of an injunction limited accordingly plaintiff will receive the full protection to which it is entitled under the Constitution of the United States. The applicable rule is that laid down in *Ratterman* v. *Western U. Teleg. Co.*, 127 U. S. 411, 32 L. Ed. 229, where in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company, derived partly from interstate commerce and partly from commerce within the state, but returned and assessed in gross and without separation or apportionment, was wholly invalid, or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that, so far as levied upon receipts derived from interstate commerce, the tax was void; but so far as levied upon receipts from commerce wholly within the state, it was valid. This case has been cited repeatedly with approval and its principle accepted. (Citing cases.)

"But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect *this* tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic;"

and again on page 649:

"There is no substance in the objection that the excise tax, as applied to *domestic sales* and *domestic use* of gasolene, infringes plaintiff's rights under the due process and equal protection clauses of the

14th Amendment. The contention that it interferes with interstate commerce because the gasolene is the product of other states already has been disposed of,"

The court then directed the cause to be remanded:

"with directions to grant a decree enjoining the enforcement, as against plaintiff, *of the license tax*, without qualification, and of the excise tax upon the *sale or use* of gasolene only with respect to sales of gasolene brought from without the state into the state of New Mexico, and there sold and delivered to customers in the original packages, whether tank cars, barrels or other packages, and in the same form and condition as when received by plaintiff in that state; but without prejudice to the rights of the state, through appellants or other officers, to enforce collection of the excise tax with respect to sales of gasolene from broken packages in quantities to suit purchasers, notwithstanding such gasolene may have been brought into the state in interstate commerce, and with respect to any and all gasolene used by plaintiff at its distributing stations or elsewhere in the state in the operation of its automobile tank wagons or otherwise;"

It is needless to call attention to the fact that this case, so far as it is based upon the "original package" theory, has been qualified since then, as witness *Baldwin* v. *Seelig*, 294 U. S. 511, 79 L. Ed. 1032, where at page 325, L. Ed. 1039, the court said:

"The test of the 'original package' which came into our law with *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. * * *

> There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 67 L. Ed. 1095; *Texas Co.* v. *Brown*, 258 U. S. 466, 66 L. Ed. 721; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 48 L. Ed. 538 * * *."

The case of *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, held merely that an act of the North Dakota Legislature, undertaking to tax purchasers of grain in interstate commerce, could not be sustained. The fact was that complainant and other buyers of like character bought grain in North Dakota to be immediately shipped to and sold at terminal markets in other states. Upon this showing the court said:

> "This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. * * * That such course of dealing constitutes interstate commerce, there can be no question."

The case of *State Board of Equalization of California* v. *Young's Market Co.*, 81 Advance Opinions, 37, in which a state statute confessedly discriminatory against intoxicating liquors produced in another state was upheld under the provisions of the Twenty-first Amendment.

The opinion in that case, instead of sustaining the position of appellants here, is distinctly to the contrary. Mr. Justice Brandeis, at page 78, 57 S. C. R., said:

> "The main contention of the plaintiffs is that the exaction of the importer's license fee violates the commerce clause by discriminating against the wholesaler of imported beer. But there is no discrimination against them *qua* wholesalers. Every one holding a wholesaler's license who is lawfully possessed of any beer may sell it. The fee exacted for the privilege of selling, and the conditions under which a sale may be made, are the same whether the beer to be sold is imported or domestic, or is both. The difference in position charged as a discrimination is not in the terms under which beer may be sold."

This decision can have no unfavorable bearing on the case at bar.

In *Hinson* v. *Lott, Tax Collector,* 8th Wall. 148, 19 L. Ed. 387, the court had under consideration a state act imposing a state tax of 50c per gallon on all intoxicating liquors brought into the state, a tax of like amount being imposed under another section upon all spirituous liquors manufactured in the state. The court held that this was not a burden upon interstate commerce, and said at page 152, L. Ed. 389:

> "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.
>
> "But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same Act, of fifty cents per gallon on all whiskey and all

> brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license, and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come, in the light of these earlier sections of the Act, to examine the 13th, 14th and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State."

This statement of the facts and law there under consideration is identical with those here and is conclusive as to this contention.

It, therefore, appears that whether this tax is construed to be a tax for the purpose of raising revenue or whether it be a tax assessed merely for the purpose of enabling the state to cover the expense of enforcing its police regulations in respect to the production, sale and distribution of milk within the state is neither discriminatory nor a burden upon interstate commerce.

In *Texas Company* v. *Brown*, 258 U. S. 466, 66 L. Ed. 721, 726, Mr. Justice Pitney, speaking for the court in regard to the power of the state to execute its police laws, said:

> "That a state is within its governmental powers in requiring inspection, including tests as to quality, as a safeguard with respect to inflammable substances such as those here involved, when found

within its borders, or even when moving in commerce from state to state (there being no legislation by Congress upon the subject), is well settled. *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158, 162, 63 L. Ed. 180, 188. That, with respect to such substances when they have passed out of interstate commerce, and have come to rest within the state, and become a part of the general mass of property, or have become the subject of domestic commerce, the state may impose inspection fees substantially in excess of the cost of inspection, and thus make them a source of general revenue, is also free from doubt, other than any which may arise from its own Constitution."

Point 5. Sections 14 and 16 of the Act Negative Any Construction of the Act Which Would Render It Unconstitutional.

On page 30, appellants contend under point "F" that if any provision of the statute is void by reason of any or all of the defects complained of, it is void in its entirety, notwithstanding the provisions contained in sections 14 and 16.

The discussion of this point in appellants' brief does not point out any particular provision of this Act which is so interwoven as not to be separable, notwithstanding the express purpose of the Legislature, as stated in section 16, except section 3 (k):

> "The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this Act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing."

Certainly there can not be any valid claim that under this section there is or can be any lack of due process, or any discrimination. The merit of the several provisions attacked has already been discussed in connection with Points 1-4, and will not be here repeated. The only section in the entire law as to which there can be any doubt as to its validity is that paragraph of section 3, sub-section 1, reading:

> "The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced, and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly."

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There is a vast difference in provisions of law by which State Milk Commissions are *required* to establish markets upon the request or demand of unofficial persons and the necessity for such Commissions to withdraw markets upon the request or demand of such persons. In the one instance, no market can operate without the approval of unofficial persons; in the other instance, the market becomes operative in all its functions, although it may be withdrawn by unofficial persons. To strike out the provision requiring a market to be established

by individuals, where there is no such request, is to leave the official body without authority to establish a market, and therefore there can be no market. To strike out the provision as to the withdrawal of a market leaves the market in full operation and the authority of the Commission fully operative as to all the provisions of the law under which the Commission acts.

In the *Bowman Case, supra,* this court recognized the authority of the law as applicable to intrastate taxation while it annulled the law as to interstate license and interstate transactions.

The decree of the lower court was clearly right and should be affirmed, whether an emergency Act or permanent legislation.

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Attorney General for Virginia.
EDWIN H. GIBSON,
Assistant Attorney General for Virginia.
JOHN S. BARBOUR,
Counsel for Appellees.

Counsel:
ABRAM P. STAPLES,
Attorney General.
EDWIN H. GIBSON,
Assistant Attorney General.
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> There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 67 L. Ed. 1095; *Texas Co.* v. *Brown,* 258 U. S. 466, 66 L. Ed. 721; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 48 L. Ed. 538 * * *."

The case of *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 66 L. Ed. 458, held merely that an act of the North Dakota Legislature, undertaking to tax purchasers of grain in interstate commerce, could not be sustained. The fact was that complainant and other buyers of like character bought grain in North Dakota to be immediately shipped to and sold at terminal markets in other states. Upon this showing the court said:

> "This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. * * * That such course of dealing constitutes interstate commerce, there can be no question."

The case of *State Board of Equalization of California* v. *Young's Market Co.,* 81 Advance Opinions, 37, in which a state statute confessedly discriminatory against intoxicating liquors produced in another state was upheld under the provisions of the Twenty-first Amendment.

The opinion in that case, instead of sustaining the position of appellants here, is distinctly to the contrary. Mr. Justice Brandeis, at page 78, 57 S. C. R., said:

"The main contention of the plaintiffs is that the exaction of the importer's license fee violates the commerce clause by discriminating against the wholesaler of imported beer. But there is no discrimination against them *qua* wholesalers. Every one holding a wholesaler's license who is lawfully possessed of any beer may sell it. The fee exacted for the privilege of selling, and the conditions under which a sale may be made, are the same whether the beer to be sold is imported or domestic, or is both. The difference in position charged as a discrimination is not in the terms under which beer may be sold."

This decision can have no unfavorable bearing on the case at bar.

In *Hinson* v. *Lott, Tax Collector,* 8th Wall. 148, 19 L. Ed. 387, the court had under consideration a state act imposing a state tax of 50c per gallon on all intoxicating liquors brought into the state, a tax of like amount being imposed under another section upon all spirituous liquors manufactured in the state. The court held that this was not a burden upon interstate commerce, and said at page 152, L. Ed. 389:

"The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.

"But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same Act, of fifty cents per gallon on all whiskey and all

> brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license, and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come, in the light of these earlier sections of the Act, to examine the 13th, 14th and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State."

This statement of the facts and law there under consideration is identical with those here and is conclusive as to this contention.

It, therefore, appears that whether this tax is construed to be a tax for the purpose of raising revenue or whether it be a tax assessed merely for the purpose of enabling the state to cover the expense of enforcing its police regulations in respect to the production, sale and distribution of milk within the state is neither discriminatory nor a burden upon interstate commerce.

In *Texas Company* v. *Brown*, 258 U. S. 466, 66 L. Ed. 721, 726, Mr. Justice Pitney, speaking for the court in regard to the power of the state to execute its police laws, said:

> "That a state is within its governmental powers in requiring inspection, including tests as to quality, as a safeguard with respect to inflammable substances such as those here involved, when found

within its borders, or even when moving in commerce from state to state (there being no legislation by Congress upon the subject), is well settled. *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158, 162, 63 L. Ed. 180, 188. That, with respect to such substances when they have passed out of interstate commerce, and have come to rest within the state, and become a part of the general mass of property, or have become the subject of domestic commerce, the state may impose inspection fees substantially in excess of the cost of inspection, and thus make them a source of general revenue, is also free from doubt, other than any which may arise from its own Constitution."

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> "The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this Act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing."

Certainly there can not be any valid claim that under this section there is or can be any lack of due process, or any discrimination. The merit of the several provisions attacked has already been discussed in connection with Points 1-4, and will not be here repeated. The only section in the entire law as to which there can be any doubt as to its validity is that paragraph of section 3, sub-section 1, reading:

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There is a vast difference in provisions of law by which State Milk Commissions are *required* to establish markets upon the request or demand of unofficial persons and the necessity for such Commissions to withdraw markets upon the request or demand of such persons. In the one instance, no market can operate without the approval of unofficial persons; in the other instance, the market becomes operative in all its functions, although it may be withdrawn by unofficial persons. To strike out the provision requiring a market to be established

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SUPREME COURT OF THE UNITED STATES.

No. 573.—October Term, 1936.

Highland Farms Dairy, Inc., et al., Appellants, *vs.* J. S. Agnew, et al., Members of the Milk Commission of the Commonwealth of Virginia, Appellees.	Appeal from the District Court of the United States for the Eastern District of Virginia.

[March 29, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

A statute of Virginia, known as the "Milk and Cream Act", is assailed by the appellants as invalid both under the Constitution of Virginia and under that of the United States.

The act is chapter 357 of the Laws of 1934. It recites the existence of demoralizing trade practices in the dairy industry, threatening to interrupt the supply of pure and wholesome milk for the inhabitants of the Commonwealth and producing an economic emergency so acute and destructive as to call for corrective measures. It establishes a Milk Commission with power to create within the state natural market areas, and to fix the minimum and maximum prices to be charged for milk and cream therein. It authorizes the Commission to exact a license from distributors subject to the act, and provides that in the absence of such a license sales shall be unlawful within the market areas. It imposes taxes or fees for the support of the Commission and of local milk boards which are to be created to coöperate with the Commission in making the plan effective. It warns (section 14) that none of its provisions "shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto". Finally it provides (section 16) that "if any section, clause, or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby." A fuller summary of the statute is given in the opinion of the court below (16 F. Supp. 575), to which reference is made. Other provisions will be noted in this opinion later.

The suit is for an injunction to restrain the members of the Commission from enforcing the statute or the regulations made thereunder. One of the two plaintiffs (Highland Farms Dairy, Incorporated), which will be spoken of as "Highland", has a creamery for the pasteurizing and treatment of milk at Washington in the District of Columbia. For that purpose it buys milk from farmers in Virginia and Maryland. Its entire output of bottled milk it sells to the other plaintiff, Luther W. High, who has retail stores in Virginia and elsewhere for the sale of ice cream, milk and other dairy products. A regulation adopted by the Commission on March 27, 1936, set up a market area, described as the Arlington-Alexandria Milk Market, within which High is engaged in business. Minimum prices prescribed for that area are in excess of the prices at which Highland had been selling to High and at which High had sold to the consumers. Each went on selling at the old prices. Neither made application for a license. In June, 1936, the Commission gave notice to High that it would proceed against him for an injunction if he refused compliance with its orders. No proceedings against Highland were begun or even threatened, the Commission taking the position that Highland was not subject to the prohibitions of the statute, its sales and purchases in Virginia being transactions in interstate commerce. In spite of this disclaimer, Highland joined with High in suing to enjoin the enforcement of the Act. A District Court of three judges, organized in accordance with section 266 of the Judicial Code (28 U. S. C. § 380), gave judgment for the defendants, with a comprehensive opinion to which little can be added. 16 F. Supp. 575. The case is here upon appeal. 28 U. S. C. § 380.

The power of a state to fix a minimum price for milk in order to save producers, and with them the consuming public, from price cutting so destructive as to endanger the supply, was affirmed by this court in *Nebbia* v. *New York*, 291 U. S. 502, and in other cases afterwards. *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251. Appellants are not asking us to undo what was there done. They take the ground, however, that the statute of Virginia is open to objections that were inapplicable to the statute of New York. The present grounds of criticism will be considered one by one.

1. The statute is not invalid as an unlawful delegation of legislative power.

The General Assembly of the Commonwealth in setting up the Milk Commission did not charge it with a duty to prescribe a scale of prices in every portion of the state. The Commission was to establish market areas, and with reference to each area was to determine, after a public hearing, whether there was need within such area that prices should be regulated. If it was satisfied of the need, it was to fix a scale accordingly. The argument for the appellants is that in this there was a grant of discretionary power overpassing the limits of lawful delegation.

The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution, Art. IV, § 4. Even if it were, the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the courts. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118; *Davis* v. *Hildebrant*, 241 U. S. 565; *Ohio* v. *Akron Park District*, 281 U. S. 74, 79, 80. Cases such as *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, cited by appellants, are quite beside the point. What was in controversy there was the distribution of power between President and Congress, or between Congress and administrative officers or commissions, a controversy affecting the structure of the national government as established by the provisions of the national constitution.

So far as the objection to delegation is founded on the Constitution of Virginia, it is answered by a decision of the highest court of the state. In *Reynolds* v. *Milk Commission*, 163 Va. 957, the Supreme Court of Appeals passed upon the validity of the statute now in question. The Commission sued distributors to enjoin them from selling milk at a price lower than the prescribed minimum, and the injunction was granted against the defendants' objection that the statute was invalid. Upon appeal to the Supreme Court of Appeals the judgment was affirmed. To escape the force of that decision the argument is made that the question of unlawful delegation was not considered or decided. But the contrary is plainly indicated both in the opinion of the court and in that of

its dissenting members. The prevailing opinion summarizes the arguments against the act, and among them is this (163 Va. at p. 976), that there is "the delegation to the Commission of the power to enact legislation which is both prohibitory and penal in character and which will be operative only in such areas as the Commission may define". The dissenting opinion says (p. 980): "The Commission may order milk to be sold at one price in Staunton, at another in Harrisburg and may leave Woodstock to shift for itself." These statements are too clear to leave room for misconstruction. A judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere.

2. The statute is not invalid in its present application by reason of a provision for the cancellation of the prices established for a market, if cancellation is requested by a majority of the producers and distributors in the area affected.[1]

The argument is made that the effect of that provision is to vest in unofficial agencies, capriciously selected, a power of repeal to be exercised at pleasure. The case of *Eubank* v. *Richmond*, 226 U. S. 137, is cited for the proposition that this cannot be done consistently with the Fourteenth Amendment of the federal Constitution. Delegation to official agencies is one thing, there being nothing in the concept of due process to require that a particular agency shall have a monopoly of power; delegation to private interests or unofficial groups with arbitrary capacity to make their will prevail as law may be something very different. Cf., however, *Cusack* v. *City of Chicago*, 242 U. S. 526, 531. Such is the appellants' argument when its implications are developed.

Without acceptance or rejection of the distinction in its application to this statute, we think it is enough to say that the power of cancellation has not been exercised or even threatened. The controversy in that regard is abstract and conjectural. *Abrams* v. *Van Schaick*, 293 U. S. 188. Moreover, if a provision so subordinate were at any time to fail, the saving clause in section 16 would cause the residue to stand.

3. The statute does not lay a burden on interstate commerce. Argument to the contrary is built upon the definition of the word

[1] The provision (Section 3 (i)) reads as follows: "The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly."

"distributor" contained in section 1. We learn from that section that distributors include "persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market, or handle milk for resale as fluid milk in the Commonwealth of Virginia." This definition, we are told, takes in the plaintiff Highland, who buys milk and sells it in interstate commerce, and does so with the expectation that upon arrival in Virginia the milk will be resold. But Highland is not subject to the provisions of the act, and so the Milk Commission has ruled. No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area. The sections quoted in the margin point fairly to that conclusion.[2] Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale. Cf. *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 175; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. If there could be any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in section 14, that operations in interstate commerce shall not be deemed to be affected. So also as to the requirement of a license expressed in setion 4.[3] High

[2] Sec. 3, subd. j: "The commission, after public hearing and investigation, may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Sec. 3, subd. k: "The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the Commonwealth."

Sec. 1, par. II: "'Market' means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area."

[3] The section reads as follows: "No distributor in a market in which the provisions of this act are in effect shall buy milk from producers, or others, for sale within the Commonwealth, or sell or distribute milk within the

needs a license to the extent that he sells at retail to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business as now conducted with persons in Virginia is interstate exclusively. Clumsy draftsmanship may have spread a fog about the section when viewed in isolation or taken from its setting. The fog scatters when we recall the provisions of section 14 and the administrative practice. Appellants' fears are visionary.

4. The statute is not invalid for failing to prescribe the standards to be applied by the Commission in granting licenses or refusing them.

The obvious purpose of the license is to provide the Commission and the members of the local boards with a record of the distributors and producers subject to the act. Supervision and enforcement are thus likely to be easier. No inference is permissible that any one was intended to be excluded because of favor or caprice. *Lieberman* v. *Van De Carr*, 199 U. S. 552. Indeed the statute makes provision (section 6) that an order refusing to issue a license, or suspending or revoking one, may be reviewed on appeal to the Supreme Court of Appeals. There is sedulous protection against oppression or abuse of power. One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon* v. *Atlanta*, 242 U. S. 53, 56; *Smith* v. *Cahoon*, 283 U. S. 553, 562. He should apply and see what happens.

Other arguments against the act are implicit in the arguments already summarized and answered. Expansion of the answer will serve no useful purpose,

The decree is *Affirmed.*

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, Mr. Justice SUTHERLAND and Mr. Justice BUTLER do not assent to so much of the opinion as attributes to the State a power to fix minimum and maximum prices to be charged in the sale of milk, their views on this question being reflected by what was said on their behalf by Mr. Justice MCREYNOLDS in *Nebbia* v. *New York*, 291 U. S. 502, 539-559. In other respects they concur in the opinion.

Commonwealth, unless such distributor is duly licensed under the provisions of this act. It shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by this act. It shall be unlawful for any distributor to deal in, or handle milk if such distributor has reason to believe it has previously been dealt in, or handled, in violation of the terms and provisions of this act."